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o. 82-5920-CSY
Status: GRANTED

Title: Kevin Micheal Shea, Petitioner
v.
Louisiana

Docketed:
December 17, 1982

Court: Supreme Court of Louisiana

Counsel for petitioner: Jack, Frances Baker

Counsel for respondent: Rutledge, Barbara, Carmouche, Paul J.

| ntry | Date | Note | Proceedings and Orders |
|---|---|---|---|
| 1 | Dec 17 1982 | G | Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. |
| 3 | Jan 27 1983 | | DISTRIBUTED. February 18, 1983 |
| 4 | Feb 4 1983 | P | Response requested. (Due March 7, 1983 - NONE RECEIVED) |
| 5 | Mar 8 1983 | | Brief of respondent State of Louisiana in opposition filed. |
| 6 | Mar 10 1983 | | DISTRIBUTED. March 25, 1983 |
| 7 | Jun 28 1983 | | DISTRIBUTED. June 29, 1983 |
| 8 | Feb 29 1984 | | REDISTRIBUTED. March 2, 1984 |
| 10 | Mar 9 1984 | | REDISTRIBUTED. March 16, 1984 |
| 12 | Mar 19 1984 | | REDISTRIBUTED. March 23, 1984 |
| 14 | Mar 26 1984 | | REDISTRIBUTED. March 30, 1984 |
| 16 | Apr 6 1984 | | REDISTRIBUTED. April 13, 1984 |
| 17 | Apr 9 1984 | X | Supplemental brief of petitioner filed. |
| 19 | Apr 16 1984 | | REDISTRIBUTED. April 20, 1984 |
| 21 | Apr 23 1984 | | REDISTRIBUTED. April 27, 1984 |
| 22 | Apr 30 1984 | | Petition GRANTED. |
| | | | ********** |
| 23 | May 12 1984 | G | Motion of petitioner for appointment of counsel filed. |
| 24 | May 25 1984 | | DISTRIBUTED. May 31, 1984. (ABOVE MOTION). |
| 26 | May 29 1984 | | Order extending time to file brief of petitioner on the merits until July 5, 1984. |
| 27 | Jun 1 1984 | | REDISTRIBUTED. June 7, 1984 (MOTION OF PETITIONER FOR APPOINTMENT OF COUNSEL). |
| 28 | Jun 11 1984 | | Motion for appointment of counsel GRANTED and it is ordered that Frances Baker Jack, Esq., of Shreveport, Louisiana, is appointed to serve as counsel for the petitioner in this case. |
| 29 | Jun 27 1984 | | Joint appendix filed. |
| 30 | Jun 28 1984 | | Order further extending time to file brief of petitioner on the merits until July 14, 1984. |
| 31 | Jul 9 1984 | | Record filed. |
| 32 | Jul 9 1984 | | Certified original record, 5 volumes, received. |
| 34 | Jul 14 1984 | | Brief of petitioner Kevin Michael Shea filed. |
| 35 | Aug 9 1984 | | Brief of respondent State of Louisiana filed. |
| 36 | Aug 21 1984 | | CIRCULATED. |
| 37 | Aug 28 1984 | | SET FOR ARGUMENT. Wednesday, November 7, 1984. (1st case) |
| 38 | Oct 18 1984 | X | Reply brief of petitioner Kevin Michael Shea filed. |
| 39 | Nov 7 1984 | | ARGUED. |

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NO. 82-5920

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

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KEVIN MICHAEL SHEA, PETITIONER

V.

STATE OF LOUISIANA

---

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF LOUISIANA

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CADDO PARISH INDIGENT
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## QUESTION PRESENTED

Whether the rule reconfirmed in Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), that the Fifth and Fourteenth Amendments require suppression of statements made during custodial investigation after a defendant has invoked his right to counsel, applies to a case pending on direct appeal when Edwards was decided.



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Petitioner, Kevin Michael Shea, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Louisiana Supreme Court rendered on October 18, 1982.

## OPINIONS BELOW

The opinion of the Louisiana Supreme Court on rehearing, not yet reported at this time, appears in the appendix hereto.

## JURISDICTION

The judgment of the Louisiana Supreme Court on rehearing was rendered on October 18, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

## CONSTITUTIONAL PROVISIONS

Amendment V. No person . . . shall be compelled in any criminal case to be a witness against himself . . . .

Amendment XIV. No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

## STATEMENT OF THE CASE

After trial by jury in state district court in Caddo Parish, Louisiana, the petitioner, Kevin Michael Shea, was convicted of the offense of armed robbery (La. R.S. 14:64) (Criminal No. 111,684-A). He pled guilty to a second count of armed robbery and reserved his right to appeal the denial of his motion to suppress inculpatory statements under State

of Louisiana v. Crosby, 338 So. 2d 584 (La. 1976) (Criminal No. 111,684). He was sentenced to consecutive sentences of seventeen years at hard labor on the first conviction and five years imprisonment at hard labor on the second.

The petitioner was arrested on July 2, 1979. He was taken to the Shreveport Police Station, where he was turned over to Detectives Smith and Snell for questioning. The petitioner was read his Miranda rights and he signed the standard Miranda card. Petitioner stated that he did not want to make any statements until he saw a lawyer. The interview was terminated at that point.

The following afternoon Detective Snell returned to the Shreveport City Jail, where he told petitioner that he was to be transferred to the parish jail. Snell asked Shea if he wanted to talk about the case. After being readvised of his rights and signing the Miranda rights card, Shea gave a statement in which he confessed to committing the robberies.

At trial, held in April 1980, the State introduced the oral confession given by the petitioner on July 3rd. As the State sought to lay the foundation for the admissibility of the confession, the petitioner objected to its admissibility on the grounds that there had not been compliance with Miranda procedures. The trial court overruled the objection, finding that the petitioner had waived his right to counsel.

On appeal to the Louisiana Supreme Court, petitioner raised the issue of the trial court's error in admitting the confession into evidence. (Assignments of Error included in Appendix.) In its original opinion, dated January 25, 1982, that court recognized that there had been a violation of the standard governing police interrogation as set forth in Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). The court went on to hold, however, that Edwards, decided on May 18, 1981, was not retroactive and, therefore, did not apply to the petitioner's case.



Petitioner applied for a rehearing with the Louisiana Supreme Court on the issue of retroactivity. The rehearing was granted. On October 18, 1982, the court again held that Edwards is not retroactive. That decision became final on November 1, 1982, after the expiration of fourteen days from the issuance of the opinion. A second rehearing was not requested.

## REASONS FOR GRANTING THE WRIT

This case presents the important question of whether the principles reaffirmed in Edwards v. Arizona are to be applied retroactively. The Louisiana Supreme Court has responded negatively to the question; however, other courts have held that Edwards should be given retroactive application. There is a conflict between the decisions of the highest courts of several states. The conflict can only be resolved by this Court granting petitioner's writ of certiorari.

In People v. Paintman, 412 Mich. 518, 315 N.W.2d 418 (1982), the Michigan Supreme Court held that Edwards did not announce a new rule but rather clarified further and reconfirmed the dictates of existing law. It viewed Edwards as simply the most recent explication of Miranda. Based on that conclusion, the court found that it was "unnecessary to analyze the question of retroactivity under traditional standards." Id at p. 423. The state of Michigan sought certiorari and this Court denied the application. _____ U.S. _____, 102 S.Ct. _____, 73 L.Ed.2d 1292 (1982).

In State v. Brown, 317 N.W.2d 714 (Minn. 1982), the Minnesota Supreme Court held that Edwards is to be applied retroactively. That court agreed with the trial court's conclusion based on "the clear language used by the Court in Edwards that the Court saw its holding not as establishing a

new rule but as reconfirming what the Court had said in Miranda v. Arizona." Id. at p. 715.

The courts of appeal in Oregon and Texas have held that Edwards is to be applied retroactively. Oregon v. Tyler, 643 P2d 379 (Ore. App. 1982); Hunt v. State of Texas (Tex. App. 1982). Other courts have applied Edwards to cases pending when the decision was announced without addressing the question of retroactivity. State of Arizona v. Platt, 637 P2d 1073 (Ariz. App. 1981); People v. Cerezo, 635 P2d 197 (Colo. 1981) (en banc).

The Edwards opinion itself recognizes that a new rule was not being formulated. This Court stated that "Miranda itself indicated that the assertion of the right to counsel was a significant event and that once exercised by the accused, 'the interrogation must cease until an attorney is present.'" 451 U.S. at 485, 68 L.Ed.2d at 386, quoting Miranda v. Arizona. The opinion then refers to the line of cases that have followed Miranda and never departed from the view initially established. In summary, the Court states:

> We reconfirm these views and, to lend them substance, emphasize that it is inconsistent with Miranda and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel. (Emphasis added.)

451 U.S. at 485, 68 L.Ed.2d at 387.

The Louisiana Supreme Court erred in holding that "the decision in Edwards was breaking new ground in the area of police procedure." The Edwards decision was nothing more than the most recent explication and reaffirmation of the right of an accused to have counsel present during custodial interrogation. The decision should be applied retroactively.

## CONCLUSION

The question of the retroactivity of Edwards has not been addressed by this Court. State supreme courts are



divided on the issue. It is an important federal issue. Petitioner respectfully prays that this Court will grant the writ of certiorari and resolve the issue favorably to petitioner.

Respectfully submitted,

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OCT 1 8 1982

SUPREME COURT OF LOUISIANA

NO. 81-KA-0377
c/w
NO. 81-KA-0378

STATE OF LOUISIANA

V.

KEVIN MICHAEL SHEA

ON REHEARING

MARCUS, Justice

We granted a rehearing in this case to reconsider our decision that the trial court correctly refused to suppress defendant's inculpatory statement.

In Miranda v. Arizona, 384 U.S. 436 (1966), the United States Supreme Court held that the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation unless the accused is first advised of, and subsequently waives, his right to remain silent and right to the presence of an attorney.[1] However, it was not clear from Miranda the standard to be applied in determining whether a person in custody has waived these rights.

Michigan v. Mosley, 423 U.S. 96 (1975), sought to answer Miranda. Mosley was arrested in connection with two robberies and was advised of his Miranda rights. Mosley subsequently informed the police that he

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1. Specifically, the accused must be warned that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

Dixon C.J. dissents
Calogero, J. dissents and assigns reasons



did not wish to answer any questions about the robberies, whereupon the police ceased the interrogation. After an interval of approximately two hours, Mosley was taken by police to a different interrogation room and was again given his Miranda warnings. In addition, he signed a waiver of rights form. The police then told Mosley that he had been implicated in a homicide. Mosley then made a statement implicating himself in the homicide. The Court held:

> [T]he admissibility of statements obtained after the person in custody has decided to remain silent depends under Miranda on whether his rights to cut off questioning was scrupulously honored. 423 U.S. at 104. (Emphasis added.)

The Court, finding that Mosley's "right to cut off questioning" was fully respected, held that the admission in evidence of his incriminating statement did not violate the principles of Miranda. However, the Court observed in footnote 7 that:

> The present case does not involve the procedures to be followed if the person in custody asks to consult with a lawyer, since Mosley made no such request at any time. Those procedures are detailed in the Miranda opinion.... (Emphasis added.)

The Court gave no reasons for distinguishing between the right to remain silent and the right to counsel. Thus, Mosley did not resolve the issue of whether the police could resume questioning of an accused following his invocation of the right to counsel.

Without an express statement of law on this issue, lower federal courts reached varied results. It

appears that a majority of the courts did not make a distinction between the right to counsel and the right to remain silent. In so doing, the courts either used the "scrupulously honor" test[2] of Mosley or the "knowing and intelligent waiver" test[3] as dictated in Johnson v. Zerbst, 304 U.S. 458 (1938).[4] A minority of the courts[5] applied a per se rule against further police interrogation once the accused invoked his right to counsel.

This court, when confronted with the issue, that is, whether the police can resume questioning of an accused following his invocation of the right to counsel, seems to have adopted the "scrupulously honor" test. State v. Thucos, 390 So. 2d 1281 (La. 1980); State v. Manning, 380 So. 2d 46 (La. 1980).

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2. See United States v. Rodriguez-Gastelum, 569 F.2d 482 (9th Cir.), cert. denied, 436 U.S. 919 (1978); United States v. Collins, 462 F.2d 792 (2d Cir.), cert. denied, 409 U.S. 988 (1972).

3. See, e.g., United States v. Grant, 549 F.2d 942 (4th Cir.), cert. denied, 432 U.S. 908 (1977); Cobbs v. Robinson, 528 F.2d 1331 (2d Cir. 1975), cert. denied, 424 U.S. 947 (1976).

4. In Johnson v. Zerbst, 304 U.S. 548 (1938), the Supreme Court held:

> A waiver is ordinarily an intentional relinquishment of a known right or privilege. The determination of whether there has been an intelligent waiver . . . must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.

Accord, e.g., Fare v. Michael C., 442 U.S. 707 (1979); North Carolina v. Butler, 441 U.S. 369 (1978).

5. E.g., United States v. Massey, 550 F.2d 300 (5th Cir. 1979); United States v. Clark, 499 F.2d 802 (4th Cir. 1972); United States v. Priest, 409 F.2d 491 (5th Cir. 1969).



In Manning, defendant was arrested at 11:50 a.m., given his Miranda warnings and taken to the police station. At the station at 2:25 a.m., he signed a waiver of rights form. Later at 5:03 a.m., while the officer was asking Manning if he understood his Miranda rights, he stated that he wanted an attorney. Questioning immediately ceased and defendant was told that an attorney would be made available to him. As the officers began preparing to leave the interrogation room, defendant announced that he did not need an attorney and that he wanted to "clear the air." Manning then made a statement at 5:08 a.m. (about five minutes after he had invoked his right to counsel). Under these facts, we concluded that Manning's Miranda rights had not been violated.

In Thucos, defendant was arrested about midnight, advised of his Miranda rights, and taken to the stationhouse where he was again informed of his rights. He elected not to sign the waiver of rights form and stated that he did not want to talk and that he would like to see an attorney. The officers allowed defendant to make a call but testified that they did not know whether he reached an attorney or not. Thereafter, defendant was brought to his cell. Later that morning, at 9:00 a.m. (some nine hours after invocation of his right to counsel), defendant was brought to the interrogation room and interrogated. Thucos was again advised of his Miranda rights, signed a waiver of rights form, and made an oral inculpatory statement. Defendant was then returned to his cell. The next morning, he was once again taken from his cell to the interrogation room where he was advised of his rights. A second

inculpatory statement was then made by defendant. Under these facts, we concluded that Thucos' rights had not been "scrupulously honored" and thus his statements were inadmissible. In distinguishing Manning, we stated:

> The officer's initiation of further questioning in this case, after defendant had asserted his right to be silent and right to have counsel present during questioning, is fatal to the admissibility of the statements made by the defendant.

Whether an accused's rights are "scrupulously honored" should depend on the particular facts of each case. Stated another way, it depends on the totality of the circumstances. The fact that the officer initiates further questioning after the accused has invoked his right to counsel should be only one of the factors considered in determining whether his right to counsel has been "scrupulously honored." Other factors, such as the time delay between the original request and subsequent interrogation, whether Miranda warnings were given before each separate interrogation, whether waiver of rights forms were signed, and whether or not pressures were asserted on the accused by the police between the time he invoked his right to counsel and the subsequent interrogation, should be considered in making this determination. In Thucos, we most probably placed too much emphasis on the officer's initiation of further questioning in reaching our conclusion.[6]

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6. In Edwards v. Arizona, ____ U.S. ____, 101 S.Ct. 1880 (1981) (discussed fully later in this opinion), initiation was made the crucial factor to be considered. However, at the time of the decision in Thucos, Edwards had not been decided and for reasons to be discussed later, we hold that Edwards is non-retroactive.



In the instant case, Shea was arrested on the afternoon of July 2, 1979, and was fully advised of his Miranda rights. He was taken immediately to the police station where he was again advised of his rights. He also signed a waiver of rights form. Shea told the detectives (Snell and Smith) that he did not want to talk about the case until he had seen an attorney. The interview was immediately terminated. After an interval of some twenty-four hours, Snell returned and told Shea that he was about to be transferred. Snell asked Shea if he wanted to talk about the case. Snell readvised Shea of his Miranda rights and defendant again signed a waiver of rights form. Shea then made a statement about his involvement in the robberies. Under the totality of the circumstances, we consider that Shea's right to counsel was "scrupulously honored." Hence, his inculpatory statement is admissible in evidence.

On May 18, 1981, Edwards v. Arizona, ____ U.S. ____, 101 S.Ct. 1880 (1981), was decided. Edwards held that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. The Court further held that an accused, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversations with the police.

In the instant case, Shea invoked his right to counsel. Counsel was never made available to him nor did Shea initiate further communication with the police. To the contrary, the police re-initiated further conversations with him. Hence, under Edwards, the resumption of interrogation was not a product of a voluntary waiver and therefore the statement would be inadmissible.

However, Shea's statement was made on July 3, 1979, some ten months prior to the Edwards decision (May 18, 1981). The issue then is whether Edwards should be given retroactive effect.[7] We think not.

In United States v. Johnson, ___ U.S. ___, 102 S.Ct. 2579 (1982), the Supreme Court stated:

> Where the Court has expressly declared a rule of criminal procedure to be a "clear break with the past," it almost invariably has gone on to find such a newly-minted principle non-retroactive.

The Edwards Court, upon announcing its new ruling, stated, "We now hold . . ." (emphasis added), which indicates that the Court felt that this holding was breaking new ground in the area of police procedure. The ruling was unanticipated.[8] Law enforcement authorities had relied on the

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7. Shortly after Edwards was decided, the Supreme Court granted certiorari in a number of cases which were apparently pending on direct review in that Court, vacated the judgments and remanded for further consideration in light of Edwards. This action does not mean that the Supreme Court will ultimately decide to give full retroactive effect to Edwards.

8. "In the course of making that holding [Edwards], Justice White established a new prophylactic rule." The Supreme Court, 1980 Term, 95 Harv.L.Rev. 127 (1981-82) (emphasis added).

"The instant majority, by establishing the new per se rule, went beyond what was necessary to exclude the confession....

[footnote 8 continued on next page]



old standards. In the instant case, the police did not know that once Shea requested counsel, further interrogation must cease until counsel had been made available to him, unless he (Shea) initiated further communication himself. The rule, therefore, as pronounced in Edwards is a "clear break with the past" and thus is non-retroactive.

In sum, the trial court correctly refused to suppress defendant's inculpatory statement.

DECREE

For the reasons assigned, our original opinion is reinstated.

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[continuation of footnote 8]

This new rule protects the suspect's choice to be free from interrogation until he consults with counsel. . . . The Court could have at least noted that its new rule was not the most faithful reading of Miranda." 33 U. Fla. L. Rev. 788, 797 (1981) (emphasis added).

"The Court instead seized upon the opportunity to announce a broad prophylactic rule in direct opposition to the previous trend toward limiting the scope of Miranda." 23 Ariz. L. Rev. 1391, 1400 (1981).

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SUPREME COURT OF LOUISIANA

STATE OF LOUISIANA

VERSUS

NO. 81-KA-0377
c/w 81-KA-0378

KEVIN MICHAEL SHEA

CALOGERO, Justice, dissenting.

I dissent from the majority opinion. In State v. Thucos, 390 So.2d 1281 (La. 1980) this Court held that inculpatory statements made by the defendant had to be suppressed where defendant had asserted his right to consult with an attorney but was nevertheless again questioned by police officers before he had an opportunity to do so. Under those circumstances, we found that the state had not met its burden of proving that the defendant's assertion of his right to an attorney had been "scrupulously honored." The instant case is indistinguishable from Thucos. Accordingly, the inculpatory statements made by this defendant pursuant to questioning initiated by the police officers after defendant had asserted his Miranda rights and requested an opportunity to consult with an attorney should likewise have been suppressed.



The majority opinion correctly states that the United States Supreme Court held, in Miranda v. Arizona, 384 So.2d 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), that the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation unless the accused is first advised of, and subsequently waives, his right to remain silent and his right to the presence of an attorney. However, the majority falls into error when it finds that Miranda did not make clear, under the circumstances involved in this case, the standard to be applied in determining whether a person in custody waived these rights.

Miranda might not have made clear the standard to be applied in a situation where the accused merely chooses to remain silent (as opposed to asserting his right to consult an attorney). Michigan v. Mosely, 423 U.S. 96, 96 S.Ct., 321, 46 L.Ed.2d 313 (1975). However, on the question of what procedure should be utilized where the accused asserts his right to counsel, the Court in Miranda specifically stated:

> Once warnings have been given, the subsequent procedure is clear . . . . If the individual states that he wants an attorney, the interrogation must cease until an attorney is present.

I fail to see what the majority finds unclear about this standard as it relates to this case. In fact, fully aware of these expressions by the high court, this Court held, in State v. Thucos, supra, that where the defendant had requested to see an attorney before answering questions, and the officers had again initiated questioning the following day without the defendant's having consulted with an attorney in the interim, the state had not met its burden of proving that the defendant's rights had been "scrupulously honored." We found the Thucos case to be distinguishable from our earlier decision in State v. Manning, 380 So.2d 46 (La. 1980), where it



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was found that the defendant's rights had been "scrupulously honored" because the defendant was the one to initiate communications with the officers after previously asserting his rights.

Yet the majority finds that Thucos is not dispositive of this case because other factors should be considered (other than that the defendant asserted his right to counsel and was nevertheless again questioned by the officers) in determining whether a defendant's rights were scrupulously honored, and because "we most probably placed too much emphasis on the officer's initiation of further questioning in reaching our conclusion" in Thucos. I find it difficult to understand how the majority can conclude that our emphasis might have been misplaced in Thucos, since, not six months later, the United States Supreme Court in Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981) came down with the exact same result, likewise placing its emphasis on the defendant's assertion of his right to counsel coupled with the initiation by the officers of further questioning. The Court in Edwards held:

> [A]lthough we have held after initially being advised of his Miranda rights, the accused may himself validly waive his rights and respond to interrogation, see North Carolina v. Butler, supra, 441 U.S., at 372-376, 99 S.Ct., at 1757-1759, the Court has strongly indicated that additional safeguards are necessary when the accused asks for counsel; and we now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only thorugh counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversations with the police. (Emphasis added.)



Perhaps the majority feels that the United States Supreme Court has misplaced its emphasis also. However, that is not a question for our determination. Therefore, whether Edwards is retroactive or not, the majority falls into serious error in cutting back on the standard set out in Thucos, where the identical position has since been taken by the United States Supreme Court.

Finally, the majority finds that Edwards should not be given retroactive effect because it created a new rule. While it is arguable whether Edwards created a "new" rule at all (to be discussed further below) in view of its reliance on Miranda, it certainly is clear that it did not create a "new" rule in Louisiana since we had previously rendered the Thucos decision on the same issue with the same result.

Furthermore, I believe that Edwards v. Arizona, supra, should be given retroactive effect. Although the United State Supreme Court has not specifically addressed the issue of prospective/retrospective application of Edwards, its actions clearly indicate that Edwards is not to be applied prospectively only. One week after handing down Edwards, the United States Supreme Court granted certiorari in six cases which involved the same issue. In each case, the petitioner was a defendant whose statement had been ruled admissible by the trial court and whose conviction had been affirmed on appeal. Blakney v. Montana, 451 U.S. 1013, 101 S.Ct. 2999, 69 L.Ed.2d 384, (1981);[1] White v. Finkbeiner, 451 U.S. 1013, 101 S.Ct. 3000, 69 L.Ed.2d 385, (1981);[2] Leuschner v. Maryland, 451 U.S. 1014, 101 S.Ct. 3001, 69 L.Ed.2d 385,

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[1] 605 P.2d 1093 (Mont. 1979).

[2] 611 F.2d 186 (7th Cir. 1979).

(1981);[3] Monroe v. Idaho, 451 U.S. 1014, 101 S.Ct. 3001, 69 L.Ed.2d 385, (1981);[4] Wantland v. Maryland, 451 U.S. 1014, 101 S.Ct. 3001, 69 L.Ed.2d 386 (1981);[5] and James v. Illinois, 451 U.S. 1014, 101 S.Ct. 3001, 69 L.Ed.2d 385 (1981).[6] One month later the Court followed this same procedure in Williams v. Ohio, 452 U.S. 935, 101 S.Ct. 3073, 69 L.Ed.2d 949 (1981).[7] The Court vacated the judgments and remanded the cases to the courts below for "further consideration in light of Edwards v. Arizona." This procedure is contrary to that adopted by the Court following its decision in Miranda. Johnson v. New Jersey, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966), decided one week after Miranda, directed that Miranda would apply only to cases in which the trial began after the date of the Miranda decision.

The belief that Edwards is to be applied to this case is further supported by People v. Paintman, 412 Mich 518, 315 N.W.2d 418 (1982), in which the Michigan Supreme Court, relying upon Edwards, ruled that Paintman's pre-Edwards statement was inadmissible. The state of Michigan sought certiorari. The United States Supreme Court denied the application. ___ U.S. ___, 102 S.Ct. ___, 50 L.W. 3935 (May 24, 1982). Accord: Connecticut v. Smith, ___ U.S. ___, 102 S.Ct. 1441 (1982).

Actually, the question whether to accord retroactive or prospective application to a decision of the United States Supreme Court only arises when that Court announces a new rule. Johnson v. United States, ___ U.S. ___, 102 S.Ct. ___, 31 Cr.L. 3100 (decided June 21, 1982); Brown v. Louisiana, 447 U.S. 323, 100 S.Ct. 2214, 65 L.Ed.2d 159 (1980);

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[3] 45 Md.App. 323, 413 A.2d 227 (1980).

[4] 101 Idaho 251, 611 P.2d 1036 (1980).

[5] 413 A.2d 1376 (Ct. Spec. App. Md. 1980).

[6] 82 Ill. App. 3d 551, 37 Ill.Dec. 934, 402 N.E.2d 936 (1980).

[7] No cite below reported.



Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 1601 (1965); Battie v. Estelle, 655 F.2d 692 (5th Cir. 1981). In my view, Edwards announces no new rule regarding the admissibility of statements obtained by the police after a defendant has invoked his right to counsel. The United States Supreme Court in Edwards specifically stated that the use of Edwards' confession at trial "violated his rights under the Fifth and Fourteenth Amendments as construed in Miranda." 451 U.S. at 480, 101 S.Ct. at 1882 (emphasis supplied). Noting that Miranda required that once an accused asserted his right to counsel, "the interrogation must cease until an attorney is present," the Court briefly discussed cases after Miranda which applied the dictates of Mi[illegible]o the particular facts presented in those cases. [illegible] Court then concluded:

> We reconfirm these views and to lend them substance, emphasize that it is inconsistent with Miranda and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel. 451 U.S. at 485, 101 S.Ct. at 1885.

Therefore, because I think Edwards v. Arizona, supra, should be applied retroactively, and in any event, State v. Thuchos, supra, is dispositive of the issue, holding that questioning is not to be initiated by police once the defendant has asserted his right to counsel until counsel has been made available to him, I dissent from the majority opinion.

JAN 25 1982

SUPREME COURT OF LOUISIANA

NOS. 81-KA-0377
AND 81-KA-0378

STATE OF LOUISIANA

Versus

KEVIN MICHAEL SHEA

APPEAL FROM THE FIRST JUDICIAL DISTRICT COURT
PARISH OF CADDO,
HONORABLE EUGENE W. BRYSON, JR., JUDGE

SWIFT, Justice Ad Hoc*

Defendant, Kevin M. Shea, has appealed two armed robbery convictions in Caddo Parish, one of Tony Tuminello at his Phillips 66 service station on July 2, 1979, and the other of Delores C. Dick at the Quick Mart Grocery Store on June 29, 1979. The first appeal involves Shea's conviction by a unanimous jury after a trial. The other is a "Crosby type" appeal in connection with a guilty plea bargain.[1] The defendant was sentenced in the first instance to 17 years and in the other case to 5 years, both at hard labor. The sentences were imposed to run consecutively, without benefit of parole, probation or suspension of sentence.

FACTS

Mr. Tuminello was robbed of cash and checks by two men after one had fired a pistol shot into the floor. When

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1. State v. Crosby, 338 So. 2d 584 (La. 1976).

*Judges E. L. Guidry, Jr. and G. William Swift, Jr. of the Court of Appeal, Third Circuit, and Judge Robert J. Klees of the Court of Appeal, Fourth Circuit, participated in this decision as Associate Justices ad hoc, joined by Associate Justices Pascal F. Calogero, Jr., James L. Dennis, Jack C. Watson and Harry T. Lemmon.

Calogero, J. concurs and assigns reasons
Lemmon, J. dissents w/reasons



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they left he immediately called the police and gave them descriptions of the robbers.

Three Shreveport police officers were having coffee at a restaurant approximately three blocks from Tuminello's filling station at the time and they were notified by radio of the armed robbery shortly thereafter. The report identified the robbers as two white males, one a blonde and the other with long dark hair, both wearing blue jeans, one with a plaid shirt and the other with a blue shirt. Leaving the restaurant a minute or so later, the officers saw two individuals who met this description walking on the sidewalk at a brisk pace. When they failed to stop on being ordered to do so and after one man made a motion with his hand as if to remove something from his waist or pocket, the police drew their weapons and apprehended the two suspects. One of these was the defendant, who had in his shirt pockets a wad of money and also some checks payable to Tuminello's business. The other, Justice M. Ratliff, had in his possession a revolver with five live shells and one spent cartridge. The two persons were taken to the police station and subsequently identified by Mr. Tuminello and by Ms. Dick in a six-man line-up.

Both suspects were advised of their Miranda rights at the scene when arrested and also at the police station. At the station Shea told the police he did not want to make any statements until he saw a lawyer and the interview was terminated at that point.

The next afternoon, July 3, 1979, just prior to Shea's transfer to the Caddo Parish prison, the detectives again approached Shea and asked him if he wanted to talk about the case. No inquiry was made as to whether he had hired a lawyer or if he was indigent. This accused was again informed of the

Miranda rights and again he acknowledged this in writing. Thereafter, although he refused a recorded interview, Shea gave a brief oral statement to the detectives admitting that he and his companion had robbed the service station. He said that he pulled the gun and demanded money from Mr. Tuminello. The latter gave him money and checks. As he was unable to carry these and the gun at the same time, he gave the gun to his accomplice and they fled. Shea also admitted that he was involved in the other robbery.

This defendant testified at the trial that he had repeated his desire for a lawyer before making the inculpatory statement. However when the detectives told him they already knew everything and that it would be better for him to cooperate, he told them what happened. The police denied that Shea asked for counsel or was promised anything on this occasion.

Ratliff subsequently pleaded guilty to both offenses and was sentenced.

ASSIGNMENT OF ERROR NO. 1 (BOTH CASES)

The defendant first contends that the district court erred in denying his motion to suppress the inculpatory statement given on July 3, because it was obtained in violation of his rights under the 5th and 14th amendments of the United States Constitution, as set forth by the Supreme Court in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966).

In State v. Thucos, 390 So. 2d 1281 (La. 1980) this court pointed out the necessity for "scrupulous honoring" of a defendant's assertion of his right to counsel, saying:

> "Before a confession or inculpatory statement can be admitted in evidence, it must be established that the accused who makes the statement during custodial interrogation was first advised of his Miranda rights and that the statement was made freely and voluntarily and not under the influence of fear, duress, intimidation, menaces, threats, inducements or promises.



> Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966); R.S. 15:451. The Supreme Court in Miranda also stated: 'Once warnings have been given, the subsequent procedure is clear.... If the individual states that he wants an attorney, the interrogation must cease until an attorney is present.' Although it has been recognized that an accused may later change his mind and waive the same rights which he earlier asserted, [State v. Manning, 380 So. 2d 46 (La.1980), and State v. Dominick, 354 So.2d 1316 (La.1978)] once a defendant has invoked his constitutional right to remain silent or his right to counsel, the validity of any subsequent waiver depends upon the 'scrupulous honoring' of that right by the police, Michigan v. Mosely, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975); State v. Manning, supra. The state's burden here is a heavy one. State v. Mouton, 366 So. 2d 1336 (La. 1978); State v. Peevy, 321 So. 2d 324 (La.1975). The courts indulge in every reasonable presumption against the waiver of fundamental constitutional rights. Brewer v. Williams, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977); Glasser v. U.S., 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942); State v. Manning, supra."

More recently, in Edwards v. Arizona, _____ U.S. _____, 101 S.Ct. 1880, _____ L.Ed. 2d _____ (1981), the United States Supreme Court said:

> "Second, although we have held that after initially being advised of his Miranda rights, the accused may himself validly waive his rights and respond to interrogation, see North Carolina v. Butler, supra, 441 U.S., at 372-376, 99 S.Ct., at 1757-1759, the Court has strongly indicated that additional safeguards are necessary when the accused asks for counsel; and we now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversations with the police." (Emphasis added.)

And after mentioning later cases dealing with the "undisputed right" under Miranda to remain silent and to be free of interrogation before consulting with a lawyer the court stated:

> "We reconfirm these views and to lend them substance, emphasize that it is inconsistent with Miranda and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel." (Emphasis added.)

In a concurring opinion Justices Powell and Rehnquist indicated an uncertainty as to whether this decision really prohibited the police from initiating an inquiry as to whether a suspect has changed his mind about talking to them without an attorney. However, it seems quite clear to us that the majority of that court has so ruled.

In the present case it is undisputed that the police did initiate such an inquiry on July 3, after having been clearly informed by the defendant on the previous evening that he would not make any statements without counsel. Consequently, there was a violation of the additional standard governing police interrogation of a suspect imposed by Edwards v. Arizona, supra.

The state alternatively contends that if the court erred in this respect the error was harmless because there is overwhelming evidence of the defendant's guilt in the record of the Tuminello robbery case.

In State v. Gibson, 391 So. 2d 421 (La. 1980), this court adopted the harmless error rule applied in Chapman v. California, 386 U.S. 13, 87 S.Ct. 824, 17 L.Ed. 2d 705 (1967), saying:

> "It appears that the Chapman test, i.e., 'whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction' and that 'the court must be able to declare a belief that [the error] was harmless beyond a reasonable doubt,' will assist this Court to fulfill both of the requirements of state law.



From the record it seems quite possible that the jury could have convicted this defendant of the Tuminello robbery without consideration of the inculpatory statement in question. However, for reasons hereinafter set forth it is unnecessary for us to decide whether or not this error was harmless beyond a reasonable doubt.

We note that Edwards was rendered on May 18, 1981. Prior thereto, of course, law enforcement authorities were unaware of any prohibition against an officer asking a suspect, who had been warned of his Miranda rights and refused to give any information without counsel, whether he had changed his mind and was then willing to be interrogated without a lawyer. In this case Shea's inculpatory statement was obtained, his motion to suppress was tried and denied, he was tried and found guilty by a jury in one case, pled guilty in the other and he was sentenced for both offenses, all before the decision in Edwards was announced. Therefore, we are presented with the question of whether or not the rule of that case is to be applied retroactively.

The United States Supreme Court does not mention this subject in its decision. However, it has directed that Escobedo[2] and Miranda, both of which introduced new standards governing police interrogation as safeguards against the use of unreliable inculpatory statements, are not to be applied retroactively. Johnson v. State of New Jersey, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966), rehearing denied, 385 U.S. 890, 87 S.Ct. 12, 17 L.Ed.2d 121. In Johnson the court decided that such newly instituted standards did not "enhance the reliability of the fact-finding process" to the extent

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2. Escobedo v. State of Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed 977 (1964).

that inculpatory statements previously obtained without their application should be excluded from evidence when the statements were found reliable under the prior tests of voluntariness. We see no sound reason why this new standard for police interrogation imposed by Edwards in regard to obtaining a suspect's statement without counsel should or will be treated differently.

This court has taken the same position with respect to retroactive application of the Dino[3] rule, excluding statements given by minors without consultation with an attorney, parent or adult. State v. Collum, 365 So.2d 1272 (La.1978), U.S. cert. den. 444 U.S. 882, 100 S.Ct. 171, 62 L.Ed.2d 111 (1979); State v. Kent, 391 So.2d 429 (La.1981).

In the present case the trial judge determined that defendant Shea's oral statement was given freely and voluntarily after he was fully advised of his Miranda rights. We agree with the court's conclusion that it was admissible under the standards existing when it was taken and also when the matter was tried. We also find that the defendant voluntarily and intelligently waived the right to counsel and his privilege against self-incrimination before making the inculpatory statement. As this occurred before the decision in Edwards was rendered and we are convinced the United States Supreme Court will pronounce that decision is not retroactive, we so hold in this case.

This assignment of error lacks merit.

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3. State in the Interest of Dino, 359 So.2d 586 (La.1978), U.S. cert. den., Louisiana v. Dino, 439 U.S. 1047, 99 S.Ct. 722, 58 L.Ed.2d 706 (1978).



ASSIGNMENT OF ERROR NO. 2 (BOTH CASES)

The defendant contends the trial court erred in denying his motions to suppress evidence and the confession obtained as a result of the arrest by the police shortly after the Tuminello robbery. He argues that the officers did not have reasonable grounds to make this investigatory stop and search of the defendants under Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), and Article 215.1 of the Louisiana Code of Criminal Procedure.

Article 215.1 authorizes a police officer to stop a person in a public place for questioning when he reasonably suspects that person is committing, has committed or is about to commit a criminal offense. Reasonable cause for an investigatory stop or detention is something less than probable cause, which much exist for a police officer to arrest without a warrant for an offense committed outside his presence. La. C.Cr.P. Art. 213(3). However, the detaining officer making such stop must have articulable knowledge of particular facts sufficient reasonably to suspect the detained person of criminal activity. State v. Edsall, 385 So. 2d 207 (La. 1980).

Under the circumstances of this case we are convinced the police officers not only had reasonable cause for an investigatory stop but also had probable cause to arrest the defendant and his accomplice without a warrant. These two persons were in the immediate vicinity of the robbery within minutes after it occurred. They fitted the descriptions of the robbers broadcast on the police radio. They were heading away from the scene of the crime at a brisk pace. Instead of initially stopping as ordered, both suspects accelerated their paces and one of them reached toward his pocket as if

to produce a weapon. Under somewhat similar facts this court upheld a stop, search and arrest in State v. Jackson, 337 So. 2d 508 (La. 1976). Also see State v. Kenner, 384 So. 2d 413 (La. 1980).

This assignment is without merit.

ASSIGNMENT OF ERROR NO. 3 (BOTH CASES)

This assignment is directed at the denial of defendant's motion to suppress out-of-court identification. Since it was neither argued nor briefed by the defendant, it should be considered as abandoned. State v. Kenner, supra. Nevertheless, we have reviewed the transcript of the pre-trial hearing of this motion and conclude that the physical line-up was properly conducted. It was not suggestive, conducive to a mistaken identification or tainted in any manner as would violate due process of law.

This assignment has no merit.

ASSIGNMENT OF ERROR NO. 4 (81-KA-0377)

In this assignment the defense contends that the trial court erred in denying its challenge for cause of prospective juror Nathaniel Willis on the grounds that the voir dire examination disclosed he was not impartial and would not accept the law as given by the court. La. C.Cr.P. Art. 797 (2 and 4).

Initially, while he recognized the presumption of innocence and the state's burden to prove guilt beyond a reasonable doubt, the juror indicated that he would expect the defendant to produce some evidence on his own behalf in order to find him not guilty. However, upon being further instructed by the trial judge in this respect and in response to additional questions, Mr. Willis said that "it would be kinda hard" but he could and would apply the law according to the court's instructions.



We believe the juror's initial answers in this instance were brought about more from a lack of understanding of the law than bias. From our review of the entire voir dire examination we are convinced of the juror's ability and willingness to decide the case impartially according to the law and evidence. We therefore conclude that the trial judge did not abuse the broad discretion vested in him in ruling on this challenge for cause. State v. Sheppard, 350 So. 2d 615, 638 (La. 1977); State v. Sonnier, 379 So. 2d 1336, 1352 (La. 1980); State v. Bates, 397 So. 2d 1331, 1333 (La. 1981).

This assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 5 (81-KA-0377)

This assignment involves the trial court's denial of defendant's motion for a mistrial on the ground that the prosecutor made a comment during the voir dire examination which referred to the possibility that the defendant would not take the stand and testify in his own defense. La. C.Cr.P. Art. 770. The remark was contained in the following question:

> "Miss Peters: The fact that the defendant doesn't have to do anything in his defense, but if the defendant elects to take the stand then that would be his right. Would you, Mrs. Hutchison, could you judge his credibility like any other witness?"

A similar argument was made in State v. Kenner, 336 So. 2d 824, 828 (La. 1976). It was rejected because of the defendant's failure to object or move for a mistrial at the time. However, this court went on to say:

> "In any event, the remarks were not a comment on the failure of defendant to take the stand, but only a statement that defendant might or might not present evidence. It has been held by this court that a prosecutor's statement that 'the evidence . . . was

uncontradicted and uncontroverted' was not an impermissible comment on the accused's failure to take the stand. State v. Singleton, 321 So.2d 509 (La.1975). Hence, we do not find that the prosecutor's remarks adversely affected defendant's due process rights in any way."

We reach the same conclusion in this instance. We do not consider the portion of the question objected to as a comment on the failure of the defendant to take the stand. Instead, the prosecutor merely mentioned the defendant's constitutional privilege not to do so and then directed a legitimate inquiry toward the weight to be accorded his statements if he should choose to testify.

This assignment is without substance.

ASSIGNMENT OF ERROR NO. 6 (81-KA-0377)

The defendant argues that the trial court erred in curtailing cross-examination of Detective John Snell, thereby denying him the opportunity to attack the credibility of this state witness by showing his bias.

The defendant's counsel attempted to ask the detective if taking statements helps the state in getting convictions. The state objected on the ground that the question called for an opinion or a conclusion and it was sustained. We agree with the trial court's ruling that the question called for an impermissible impression or opinion of a witness not shown to have special knowledge in that field. La. R.S. 15:463 and 464. Furthermore, we are unable to see how the defendant could have been prejudiced or harmed by such ruling.

This assignment has no merit.

ASSIGNMENTS OF ERROR NOS. 7, 8 AND 9 (81-KA-0377)

Since these assignments of error were neither argued nor briefed by the defendant, they will be considered abandoned. State v. Kenner, supra.



ASSIGNMENT OF ERROR NO. 10 (81-KA-0377)
& ASSIGNMENT OF ERROR NO. 4 (81-KA-0378)

Lastly, defendant Shea contends that his sentences are excessive. His principal complaint seems to be directed at the disparity between his consecutive sentences of 17 and five years and those of his accomplice Ratliff of two concurrent seven and one-half years sentences imposed pursuant to guilty pleas for the same robberies. Such comparison alone is not sufficient to establish an unconstitutional excessive sentence. State v. Bonanno, 373 So. 2d 1284, 1294 (La. 1979).

Ratliff's background is not in the record before us. However, we note that at the time of these offenses Shea was on probation for a felony theft convicted in Texas. He was the one who held the revolver and discharged it in the proximity of the victim Tuminello.

Before the 17 year sentence was imposed the trial judge ordered a pre-sentence investigation and permitted the defense to review the report. A pre-sentence hearing was held, after which the judge stated for the record in detail the considerations which he took into account and the factual bases for imposing sentence under the guidelines of La. C.Cr.P. Art. 894.1.

Under the circumstances and as armed robbery is one of the most serious crimes in Louisiana, for which the Legislature has provided a minimum sentence of five years and a maximum of 99 years, without benefit of parole, probation or suspension of sentence, it is quite clear to us that the trial judge did not abuse his wide discretion in sentencing this defendant to serve 17 years at hard labor for the Tuminello robbery.

The defendant also contends that the five year sentence imposed in the other case is excessive inasmuch as

the trial judge ordered that it be served consecutive to his 17 year sentence. He argues that the second sentence should have been made to run concurrently under La. C.Cr.P. Art. 883, because the two offenses constituted parts of a common scheme or plan. We disagree. These two robberies occurred four days apart and were separate crimes. But even if they were considered a single course of criminal conduct, Article 883 is not phrased in mandatory terms. More important, the five year sentence in the Quick Mart robbery case was imposed pursuant to a plea bargain to which the defendant, the district attorney and the judge had agreed. Consequently, he is precluded from complaining of excessiveness of that sentence before this court. State v. Curry, 400 So. 2d 614 (La. 1981). Also, it appears that the only condition to the defendant's guilty plea was the reservation of his rights to appellate review of the trial court's ruling on his motion to suppress.

These assignments of error therefore lack merit.

For the foregoing reasons, the convictions and sentences are affirmed.

AFFIRMED.





STATE OF LOUISIANA

VERSUS

NO. 81-KA-0377 c/w
NO. 81-KA-0378

KEVIN SHEA

OFC

CALOGERO, Justice, concurring.

The majority finds that Edwards v. Arizona ___ U.S. ___, 101 S.Ct. 1880 (1981), prohibits the police from initiating an inquiry as to whether a suspect, who earlier chose not to talk without an attorney, had changed his mind. I am not convinced that Edwards v. Arizona stands for that proposition. Edwards probably should be construed more narrowly than that in my opinion.

The majority determines that Edwards v. Arizona should be applied only prospectively. I am not convinced that this is correct. In my mind the Edwards opinion may well enhance the truth finding process, as opposed to simply creating a prophylactic deterrence of police activity.

For the reason first above stated I concur in the majority's affirmance of defendant's conviction and find in this case no need to decide the retroactive/prospective

question.. Defendant's statement of July 3, 1979, was not improperly admitted in evidence. Defendant neither asked for counsel nor "expressed his desire to deal with police only through counsel." Edwards v. Arizona, supra. An informed accused may waive his rights to silence and to counsel and respond to interrogation. North Carolina v. Butler, 441 U.S. 372, 376, 99 S.Ct. 1757, 1759 (1979).

This case is different from our recent State v. West, ___ So.2d __ (La. 1982), No. 81-KA-0675, where defendant had been advised by his attorney to make no statement to police, the police officers were fully aware of that fact, and they took a statement from him nonetheless.



SECTION

STATE OF LOUISIANA — NUMBER 111,694 A

VERSUS — FIRST JUDICIAL DISTRICT COURT

KEVIN MICHAEL SHEA — CADDO PARISH, LOUISIANA

ASSIGNMENTS OF ERROR

Kevin Michael Shea, defendant herein, assigns as error for purposes of appeal to the Louisiana Supreme Court the following actions of the trial court, to-wit:

1.

The trial court erred in denying the defendant's Motion to Suppress Inculpatory Statements.

2.

The trial court erred in denying the defendant's Motion to Suppress Evidence.

3.

The trial court erred in denying the defendant's Motion to Suppress Out-of-Court Identification.

4.

The trial court erred in denying the defendant's challenge for cause of prospective juror, Nathaniel Willis.

5.

The trial court erred in failing to grant the defendant's motion for mistrial and/or to empanel a new jury venire during the State's voir dire examination.

6.

The trial court erred in curtailing cross-examination of Detective John Snell.

7.

The trial court erred in admitting into evidence S-1 and S-19.

8.

The trial court erred in admitting into evidence S-14 and S-15.

9.

The trial court erred in admitting into evidence S-9, S-10 and S-20.

10.

The trial court erred in imposing an excessive sentence in violation of Article I, Section 20 of the 1974 Louisiana Constitution.

INDIGENT DEFENDER OFFICE
311 Slattery Building
Shreveport, Louisiana 71101

Jeanette G. Garrett
JEANETTE G. GARRETT
Assistant Indigent Defender

C E R T I F I C A T E

I HEREBY CERTIFY that a copy of the foregoing Assignments of Error has been forwarded to Sonia D. Peters, Assistant District Attorney, 501 Caddo Parish Courthouse, Shreveport, Louisiana, this date.

Jeanette G. Garrett
JEANETTE G. GARRETT
Assistant Indigent Defender



FILED
JAN 14 1981
Deputy Clerk

STATE OF LOUISIANA — SECTION
VERSUS — NUMBER 111,684
KEVIN MICHAEL SHEA — FIRST JUDICIAL DISTRICT COURT
CADDO PARISH, LOUISIANA

ASSIGNMENTS OF ERROR

Kevin Michael Shea, defendant herein, assigns as error for purposes of appeal to the Louisiana Supreme Court the following actions of the trial court, to-wit:

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4.

The trial court erred in imposing an excessive sentence in violation of Article 1, Section 20 of the 1974 Louisiana Constitution.

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Assistant Indigent Defender

C E R T I F I C A T E

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Jeanette G. Garrett
JEANETTE G. GARRETT
Assistant Indigent Defender

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IN THE SUPREME COURT OF THE

UNITED STATES

NO: 82-5920

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KEVIN MICHAEL SHEA

Petitioner,

versus

STATE OF LOUISIANA

Respondent.

---

# BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA ON BEHALF OF RESPONDENT, STATE OF LOUISIANA

---

PAUL J. CARMOUCHE
DISTRICT ATTORNEY
PARISH OF CADDO

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UNITED STATES CONSTITUTION


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## QUESTION PRESENTED

Whether the rule set forth in Edwards v. Arizona, 451 U.S. 477, 68 L.Ed.2d 378, 101 S.Ct. 1880, rehearing denied U.S., 69 L.Ed.2d 984, 101 S.Ct. 3128 (1981), applies retroactively to previously decided cases. That rule states: upon the invocation of his right to counsel by an accused, a valid waiver of the right to counsel cannot be established by showing that he responded to a police-initiated custodial interrogation even though he has been advised of his rights as per Miranda.



## STATEMENT OF THE CASE

On July 2, 1979, Kevin Michael Shea was arrested for the crime of armed robbery of Tony Tuminello at his Phillips 66 station in Shreveport, Caddo Parish, Louisiana. Michael Shea was arrested within a few blocks of the scene of the crime. He was taken to the Shreveport Police Station and advised of his Miranda rights.

At this time, Michael Shea told police that he did not want to make any statements until he had seen a lawyer and the interview was terminated at that point.

On July 3, 1979, Michael Shea was about to be transported to the Caddo Parish Prison, a larger holding facility, when he was approached by a detective and asked if he wanted to talk about the case. There was no inquiry as to whether or not he had obtained counsel.

Michael Shea was again advised of his rights and, thereafter, gave a brief oral statement to the detectives admitting that he and his companion had robbed Mr. Tuminello. At the trial of the case, the defendant testified that he had repeated his desire for a lawyer before he gave his inculpatory statement. Additionally, he said that he was told by the detectives that they already knew everything and it would be better for him to cooperate. This allegation was denied by the detectives and they further stated that they never promised Mr. Shea anything on this occasion.

At the trial of this case in April of 1980, and on appeal to the Louisiana Supreme Court, Michael Shea objected to the introduction of the oral statement on the grounds

that the statement had been obtained in violation of his rights under the Fifth and Fourteenth Amendments to the United States Constitution, as set forth by the Supreme Court of the United States in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). In its original decision dated January 25, 1982, the Louisiana Supreme Court recognized that there was a violation of the additional standard (emphasis added) governing police interrogation of a suspect imposed by Edwards v. Arizona, supra. However, the Louisiana Supreme Court found that this standard of police interrogation is a new procedural rule and, therefore, should not be applied retroactively. Johnson v. State of New Jersey, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966), rehearing denied, 385 U.S. 890, 87 S.Ct. 12, 17 L.Ed.2d 121; and United States v. Johnson, ____ U.S. ____, 102 S.Ct. 2579 (1982).

On October 18, 1982, the Louisiana Supreme Court reviewed the matter on rehearing on the issue of retroactivity and held that the Edwards case, supra, should not be applied retroactively. From this decision, Michael Shea has applied to this court for writs of certiorari.



## REASONS FOR DENYING THE APPLICATION FOR WRIT OF CERTIORARI

The petitioner cites several cases which refer to the conflicts between the states on the issue of the retroactivity of the Edwards decision, supra. However, a close analysis of the opinion issued in the Edwards case, supra, clearly shows that this court did set forth new safeguards regarding the waiver of the right to counsel by an accused.

In Miranda v. Arizona, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602, 10 Ohio Misc. 9, 36 Ohio OPS 2d 237, 10 A.R 3d 974 (1976), this court held that the Fifth and Fourteenth Amendments prohibited compelled self-incrimination during custodial interrogation which was not preceeded by advice to the defendant that he has the right to remain silent and the right to the presence of an attorney during interrogation.

Therefore, Miranda, supra, held that a defendant in custody must be advised of certain constitutional rights prior to custodial interrogation. In dicta, the court further stated that these rights could be waived.

In Edwards v. Arizona, supra, this court addressed the issue: what constitutes a valid waiver of a defendant's rights under the Fifth and Fourteenth Amendments to the Constitution of the United States. At p. 386 this court stated:

> ...the court has strongly indicated that additional safeguards are necessary when the accused asks for counsel; and we now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to

> further police initiated interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused initiates further communication, exchanges or conversations with the police.

Clearly, the majority decision sets forth a new procedural rule that the police must follow. Now the police cannot re-initiate interrogation of an accused once he has invoked his right to counsel. If the police do re-initiate such interrogation, then there can be no valid waiver by an accused of his constitutional rights.

In concurring opinions, Chief Justice Burger, Justice Powell and Justice Rehnquist agreed with the results, but expressed concern over the rigid per se rule.

The Louisiana Supreme Court recognizedthat this holding declared a new rule and correctly determined that Edwards, supra, should not be given retroactive effect. The court noted in Footnote 8 that the ruling of the Edwards' court was unanticipated. Thus the Louisiana Supreme Court correctly held that the Edwards decision was breaking new ground in the area of police procedure and should not be applied retroactively. The principal reason that it is a new rule is that the court no longer will examine the totality of the circumstances in determining a valid waiver of rights.



## CONCLUSION

The question: whether the Edwards decision should be applied retroactively has not been addressed by this court, The decision by this court in Edwards pronounced a new rule about how courts must determine whether an accused has waived his constitutional rights during custodial interrogation. It is a per se rule thatdoes not allow collateral inquiry. The respondent respectfully suggests to this court that for this reason the decision in Edwards should not be applied retroactively. Therefore, the application for writ of certiorari should be denied.

Respectfully submitted,

DALE G. COX
ASSISTANT DISTRICT ATTORNEY

## C E R T I F I C A T E

I HEREBY CERTIFY that a copy of the foregoing brief has been furnished to Mr. Don Minor, counsel for petitioner, 311 Slattery Building, Shreveport, Louisiana, 71101, this 4th day of March, 1983.

DALE G. COX

# Supreme Court of the United States

No. 82-5920

Kevin Michael Shea,

Petitioner,

v.

Louisiana

ON CONSIDERATION of the motion for appointment of counsel,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted and it is ordered that Frances Baker Jack, Esq., of Shreveport, Louisiana, is appointed to serve as counsel for the petitioner in this case.

June 11, 1984

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO. 82-5920

APR 13 PAGE 21

KEVIN MICHAEL SHEA,

Petitioner

V.

STATE OF LOUISIANA,

Respondent

SUPPLEMENTAL PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

FRANCES BAKER JACK
642 STONER AVENUE
SHREVEPORT, LOUISIANA 71101
(318) 221-6294
ATTORNEY FOR PETITIONER

In December 1983, petitioner, proceeding in forma pauperis, filed a petition for writ of certiorari in this Honorable Court. The question presented therein is whether the rule reconfirmed in Arizona v. Edwards, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), that the Fifth and Fourteenth Amendments require supression of statements made during custodial investigation after a defendant has invoked his right to counsel, applies to a case pending on direct appeal when Edwards was decided. The State of Louisiana responded to the petition on March 4, 1983. No further action has been taken on the matter, though undersigned counsel has learned from the Clerk's office that it is set for conference on March 30, 1984.

On February 29, 1984, the Court decided the case of Stolem v. Stumes, 52 LW 4307, in which the retroactivity of Edwards was at issue. The holding that Edwards would not be applied retroactively was limited to the facts of the case. Noting that "[a]t a minimum, nonretroactivity means that a decision is not to be applied in collateral review of final convictions" the Court then stated "[f]or purposes of this case, that is all we need decide about Edwards." 52 LW 4310. After discussing the various lines at which nonretroactivity has been drawn, the Court concluded that "[j]ust where the line should be drawn as to Edwards need not be decided today." 52 LW 4311.

Petitioner submits that his case presents the opportunity to draw that line. Whereas Solem's case was on appeal from a denial of a writ of habeas corpus when Edwards was decided, petitioner's case was on direct appeal following conviction. Whether the rule of Edwards applies to petitioner's case was not decided in Solem. The Court should grant petitioner's application and address the question that remains to be answered.

Respectfully submitted,

By: Frances Baker Jack

FRANCES BAKER JACK
642 Stoner Avenue
Shreveport, Louisiana 71101
(318) 221-6294
ATTORNEY FOR PETITIONER

## CERTIFICATE

This is to certify that I have this day served upon opposing counsel the within and foregoing Supplement Petition for Writ of Certiorari to the Supreme Court of Louisiana, by mailing one copy thereof, postage prepaid, to Mr. William J. Guste, Jr., Attorney General of Louisiana, Supreme Court Building, 301 Loyola Avenue, New Orleans, Louisiana 70112; and Mr. Carey Schimpf, Assistant District Attorney, 501 Caddo Parish Courthouse, Shreveport, Louisiana 71101, this 27th day of March, 1984.

Frances Baker Jack
FRANCES BAKER JACK
Attorney for Petitioner

Office - Supreme Court, U.S.
FILED
JUN 27 1984
ALEXANDER L. STEVAS,
CLERK

No. 82-5920

# In the Supreme Court of the United States

OCTOBER TERM, 1983

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KEVIN MICHAEL SHEA,

*Petitioner,*

v.

STATE OF LOUISIANA

---

ON WRIT OF CERTIORARI TO THE
LOUISIANA SUPREME COURT

---

## JOINT APPENDIX

---

PAUL J. CARMOUCHE
District Attorney
Caddo Parish
501 Caddo Parish Courthouse
Shreveport, Louisiana 71101
(318) 226-6826
*Counsel for Respondent*

FRANCES BAKER JACK
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212 Texas Street
Shreveport, Louisiana 71101
(318) 425-0010
*Counsel for Petitioner*

---

PETITION FOR CERTIORARI FILED DECEMBER 17, 1982.
CERTIORARI GRANTED APRIL 30, 1984.

BEST AVAILABLE COPY

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## RELEVANT DOCKET ENTRIES

August 15, 1979 —Motion To Suppress Confession filed by Defendant

April 28, 1980 —Notice Of Intent To Use Statements filed by State

April 29, 1980 —Trial Court Ruled Statements Admissible (Docket No. 111,684-A)

December 19, 1980 —Motion to Suppress Inculpatory Statements filed by Defendant and Overruled; Defendant's Withdrawal of Previous Plea and Entry of Guilty Plea with Reservation of Right to Appeal Ruling on Motion To Suppress (Docket No. 111,684)

January 25, 1982 —Original Opinion of the Louisiana Supreme Court

October 18, 1982 —Louisiana Supreme Court Opinion on Rehearing (No. 81-KA-0377-78)

October 19, 1982 —Dissenting Opinion of Louisiana Supreme Court Justice Calogero

April 30, 1984 —Order of the Supreme Court of the United States Granting Leave to Proceed in Forma Pauperis and Granting Petition For Writ of Certiorari

FIRST JUDICIAL DISTRICT COURT
CADDO PARISH, LOUISIANA

Number 111,684

STATE OF LOUISIANA

*versus*

KEVIN MICHAEL SHEA

MOTION TO SUPPRESS CONFESSION—
Filed Aug. 15, 1979

NOW INTO COURT, through undersigned counsel, comes KEVIN MICHAEL SHEA, defendant in the above numbered and styled prosecution and files this Motion to Suppress all written or recorded confessions or other inculpatory statements obtained from him for the following reasons, to-wit:

1.

Said written, recorded, or inculpatory statements obtained from the defendant were a result of an illegal stop, search and arrest in violation of Article 1, Section 5 of the Louisiana Constitution of 1974 and the Fourth Amendment of the United States Constitution and therefore all said statements or confessions are tainted.

WHEREFORE, the defendant prays that this motion be filed and allowed and that in due course, the Court order the defendant's written, recorded statements, or confessions or other inculpatory statements be held inadmissible in this case.

INDIGENT DEFENDER OFFICE
204 Ricou Brewster Bldg.
Shreveport, Louisiana 71101

By: /s/ Howard M. Fish
HOWARD M. FISH
Assistant Indigent Defender

Certificate of Service (omitted in printing)



FIRST JUDICIAL DISTRICT COURT
CADDO PARISH, LOUISIANA

Number 111684-A

STATE OF LOUISIANA

*versus*

KEVIN MICHAEL SHEA

NOTICE OF INTENT TO USE STATEMENTS—
Filed Apr. 28, 1980

NOW INTO COURT, through the undersigned Assistant District Attorney, comes the State of Louisiana, which respectfully shows:

1.

During the investigation of the crime charged in the above entitled and numbered cause, certain oral and/or written statements and/or admissions were made by the following:

On June 2, 1979 defendant made res gestae statements to Tonny Tuminello at 730 Crockett, Caddo Parish, Louisiana during the course of the armed robbery of Mr. Tuminello.

On June 3, 1979 defendant made an oral statement at the Shreveport City Jail to Detectives Snell, Smith and Shields. The defendant admitted robbing Mr. Tuminello and that he had the weapon during the robbery. He stated that the gun belonged to Ratliff so he gave him back the gun because he couldn't hold both gun and money.

2.

Upon trial of said cause, the State of Louisiana may introduce said statements and/or admissions, and offer same as evidence against said defendant.

/s/ Sonia D. Peters
SONIA D. PETERS
Assistant District Attorney
501 Caddo Parish Courthouse
Shreveport, Louisiana 71101

Certificate of Service (omitted in printing)



FIRST JUDICIAL DISTRICT COURT
CADDO PARISH, LOUISIANA

Section 2

Number 111,684

STATE OF LOUISIANA

*versus*

KEVIN MICHAEL SHEA

MOTION TO SUPPRESS INCULPATORY STATEMENTS—Filed Dec. 19, 1980

NOW INTO COURT, through undersigned counsel, comes Kevin Michael Shea, defendant in the above numbered and titled prosecution and files this Motion to Suppress for use as evidence all confessions and/or other inculpatory statements obtained from defendant for the following reasons, to-wit:

1.

Defendant is charged with the offense of armed robbery as set forth in R.S. 14:64.

2.

After arrest and while in custody of the City of Shreveport Police Department, defendant made statements to Shreveport police authorities which are inculpatory in nature.

3.

Defendant believes the aforementioned inculpatory statements were made upon an arrest without probable cause. [See *Brown v. Illinois*, 422 U.S. 590, 45 L.Ed. 416, 95 S.Ct. 2254 (1975)]

4.

Further, the aforementioned inculpatory statements were made under either the influence of fear, duress, in-

timidation, menaces, threats, inducements and/or promises, and/or without defendant having been properly advised of his rights to remain silent and to have counsel appointed to represent him, and/or without a sufficient understanding of his rights in order to make an intelligent waiver of those rights. [See U.S. Const., Amends. 5, 6 and 14; La. Const., 1974, Sections 13 and 16; and LSA-R.S. 15:452]

WHEREFORE, defendant prays that this Motion be filed and in due course, the Court rule defendant's aforementioned inculpatory statements to be inadmissible as evidence in this case.

INDIGENT DEFENDER OFFICE
311 Slattery Building
Shreveport, Louisiana 71101

/s/ Howard M. Fish
HOWARD M. FISH
Assistant Indigent Defender

Certificate of Service (omitted in printing)



[158]

IN THE
FIRST JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF CADDO
STATE OF LOUISIANA

Case No. 111,684

STATE OF LOUISIANA

*versus*

KEVIN MICHAEL SHEA

APPEARANCES:

MISS SONIA D. PETERS
Assistant District Attorney

MR. HOWARD FISH
Counsel for Defendant

TRANSCRIPT OF PROCEEDINGS—December 19, 1980

PROCEEDINGS HAD in the above matter before His Honor, FRED C. SEXTON, JR., Judge of the First Judicial District Court, in and for the Parish of Caddo, State of Louisiana, on December 19, 1980.

[159] THE COURT: Miss Peters, Mr. Fish.

MISS PETERS: Yes, Your Honor. We will call the matter of Kevin Michael Shea. Your Honor, Mr. Shea is before the Court with his attorney, Mr. Fish. He has previously entered a plea of not guilty to armed robbery involving Delores Dick. It is my understanding he would plead guilty at this time with some understandings, I believe Mr. Fish can relate those.

MR. FISH: Yes, Your Honor. At this time, Mr. Shea would like to withdraw his previously entered plea of not guilty and enter a plea of guilty to the remaining armed robbery count, with the understanding that pursuant to that guilty plea he would—he would be able to under the authority of *State of Louisiana versus*

*Crosby*, to appeal the issue of the search and seizure on the motion to suppress evidence, which has already been litigated and tried in September of 1979, as well, Your Honor, he has filed a motion to suppress statement that the State would intend to use at trial against him in this count. I believe the State has agreed to stipulate that the *Crosby* appeal would also apply as to the motion to suppress evidence, which we are willing to stipulate the testimony would be the same at trial at the motion to suppress—

THE COURT: That is the motion to suppress the physical evidence or the motion on the statement?

[160] MISS PETERS: No, Your Honor, we've already had the motion to suppress physical evidence, it was overruled.

THE COURT: And that does not apply to this case or it does apply to this case?

MR. FISH: It does apply to this case.

THE COURT: It does apply to this case? All right. But it has been held and overruled, correct?

MR. FISH: Yes, Your Honor.

THE COURT: And in addition, there is a statement at issue in this case, the freeness and voluntariness of which has not been decided, but the evidence for which is already in the record, with respect to another case?

MISS PETERS: That's correct, Your Honor.

MR. FISH: That's correct, Your Honor.

THE COURT: That's correct. And we have discussed that evidence, though I have not reviewed that evidence and you understand that I am going to take the same action as the Judge did on the previous case and that is to overrule the motion to suppress with respect to the freeness and voluntariness in this case?

MR. FISH: That's [161] correct, Your Honor.

THE COURT: All right. And your client wants to reserve his rights to appeal with respect to both the free and voluntariness and the search and seizure of tangible evidence with respect to this case?



MR. FISH: Yes, Your Honor, and the motion to suppress the search and seizure, as you also referred to the statements as well.

THE COURT: Right.

MR. FISH: That is to the initial probable cause for arrest.

THE COURT: Okay. There are additional understandings. Let me ask Mr. Shea if he follows what we said and if that's his understanding?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Now, I told you that I was going to give Mr. Shea five years on this charge, consecutive to his other sentence?

MR. FISH: That's correct, Your Honor.

THE COURT: And I also believe the State has asserted they will not file a multiple bill under these circumstances?

MISS PETERS: That's correct.

THE COURT: Is that [162] correct?

MR. FISH: Yes, sir.

THE COURT: Do you follow that Mr. Shea?

THE DEFENDANT: Yes, sir.

THE COURT: And that's your understanding?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that in entering the plea that you waive your right to a trial by jury on this charge?

THE DEFENDANT: Yes, sir.

THE COURT: And you also waive your right to face the persons who accuse you on this charge?

THE DEFENDANT: Yes, sir.

THE COURT: And you further give up your right against compulsory self-incrimination on the charge?

THE DEFENDANT: Yes, sir.

THE COURT: The facts, Miss Peters?

MISS PETERS: Your Honor, on June 29th of 1979, Kevin Michael Shea, along with a co-defendant robbed Delores Dick. This was at the Quick Mart Grocery Store,

North Market, in Caddo Parish. Shea was armed at that time, with a pistol and received approximately $180.00 in cash was taken from the cash register, which was in the control of Ms. Dick at that time, as the employee of the Quick Mart. [163] After their arrest, as to another armed robbery, an unrelated armed robbery, Mr. Shea gave a statement to police officers admitting his involvement in the Quick Mart armed robbery. The victim, Ms. Dick, did ID Mr. Shea from a live line-up and a latent print was lifted in the Quick Mart Store and it was matched to Kevin Shea.

THE COURT: Are those facts essentially correct, Mr. Shea?

THE DEFENDANT: Yes, sir.

THE COURT: All right, sir. What is your age, sir?

THE DEFENDANT: 20.

THE COURT: All right, sir. So, you were 19 a year ago, obviously?

THE DEFENDANT: Yes, sir.

THE COURT: Were you 19 or 18 at the time of these alleged offenses?

THE DEFENDANT: 18 at the time.

THE COURT: Okay. Now, one other thing I have to be sure that you understand, that the five years I told you I will impose is without benefit of parole, probation, or suspension of sentence?

THE DEFENDANT: Yes, sir.

THE COURT: And it is consecutive to your other sentence?

THE DEFENDANT: Yes, sir.

THE COURT: You [164] understand that?

THE DEFENDANT: Yes, sir.

THE COURT: All right, sir. I have discussed the case with your attorney and the District Attorney and considering the fact that you have seventeen and a half years to do on the other armed robbery, I think that the minimum sentence of five years without benefit of parole, probation or suspension of sentence at hard labor is appropriate here and that is the sentence of the Court.



MR. FISH: Your Honor, at this time, pursuant to the *Crosby* plea, I would like to at this time, move for an appeal to the Louisiana Supreme Court.

THE COURT: All right, sir. The Clerk will affix appropriate dates. Are you able to do so now?

THE CLERK: Yes, sir. Okay. Your return date is going to be February 16th. Your designation of record would be December the 23rd. Okay—

THE COURT: That's supposed to be the 24th, isn't it Mr. Clerk? He gets five days on that. I would hope he would get it in by the 23rd, it should be pretty simple.

MR. FISH: I don't have any difficulty with that, Your Honor.

THE COURT: Well, that would still make it the 24th. You're entitled to five days. I know Christmas Eve is a tough time to try to [165] be getting something done around here. Okay. Your assignment of errors would be February 2nd. All right, sir. So ordered.

MR. FISH: Thank you, Your Honor.

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Clerk's Certificate (omitted in printing)

SUPREME COURT OF LOUISIANA

Nos. 81-KA-0377
and 81-KA-0378

STATE OF LOUISIANA

*versus*

KEVIN MICHAEL SHEA

APPEAL FROM THE FIRST JUDICIAL DISTRICT COURT
PARISH OF CADDO,
HONORABLE EUGENE W. BRYSON, JR., JUDGE

OPINION—January 25, 1982

SWIFT, Justice Ad Hoc *

Defendant, Kevin M. Shea, has appealed two armed robbery convictions in Caddo Parish, one of Tony Tuminello at his Phillips 66 service station on July 2, 1979, and the other of Delores C. Dick at the Quick Mart Grocery Store on June 29, 1979. The first appeal involves Shea's conviction by a unanimous jury after a trial. The other is a "Crosby type" appeal in connection with a guilty plea bargain.[1] The defendant was sentenced in the first instance to 17 years and in the other case to 5 years, both at hard labor. The sentences were imposed to run consecutively, without benefit of parole, probation or suspension of sentence.

---

* Judges E. L. Guidry, Jr. and G. William Swift, Jr. of the Court of Appeal, Third Circuit, and Judge Robert J. Klees of the Court of Appeal, Fourth Circuit, participated in this decision as Associate Justices ad hoc, joined by Associate Justices Pascal F. Calogero, Jr., James L. Dennis, Jack C. Watson and Harry T. Lemmon.

[1] State v. Crosby, 338 So. 2d 584 (La. 1976).



*FACTS*

Mr. Tuminello was robbed of cash and checks by two men after one had fired a pistol shot into the floor. When they left he immediately called the police and gave them descriptions of the robbers.

Three Shreveport police officers were having coffee at a restaurant approximately three blocks from Tuminello's filling station at the time and they were notified by radio of the armed robbery shortly thereafter. The report identified the robbers as two white males, one a blonde and the other with long dark hair, both wearing blue jeans, one with a plaid shirt and the other with a blue shirt. Leaving the restaurant a minute or so later, the officers saw two individuals who met this description walking on the sidewalk at a brisk pace. When they failed to stop on being ordered to do so and after one man made a motion with his hand as if to remove something from his waist or pocket, the police drew their weapons and apprehended the two suspects. One of these was the defendant, who had in his shirt pockets a wad of money and also some checks payable to Tuminello's business. The other, Justice M. Ratliff, had in his possession a revolver with five live shells and one spent cartridge. The two persons were taken to the police station and subsequently identified by Mr. Tuminello and by Ms. Dick in a six-man line-up.

Both suspects were advised of their Miranda rights at the scene when arrested and also at the police station. At the station Shea told the police he did not want to make any statements until he saw a lawyer and the interview was terminated at that point.

The next afternoon, July 3, 1979, just prior to Shea's transfer to the Caddo Parish prison, the detectives again approached Shea and asked him if he wanted to talk about the case. No inquiry was made as to whether he had hired a lawyer or if he was indigent. This accused was again informed of the Miranda rights and again he

acknowledged this in writing. Thereafter, although he refused a recorded interview, Shea gave a brief oral statement to the detectives admitting that he and his companion had robbed the service station. He said that he pulled the gun and demanded money from Mr. Taminello. The latter gave him money and checks. As he was unable to carry these and the gun at the same time, he gave the gun to his accomplice and they fled. Shea also admitted that he was involved in the other robbery.

This defendant testified at the trial that he had repeated his desire for a lawyer before making the inculpatory statement. However when the detectives told him they already knew everything and that it would be better for him to cooperate, he told them what happened. The police denied that Shea asked for counsel or was promised anything on this occasion.

Ratliff subsequently pleaded guilty to both offenses and was sentenced.

*ASSIGNMENT OF ERROR NO. 1 (BOTH CASES)*

The defendant first contends that the district court erred in denying his motion to suppress the inculpatory statement given on July 3, because it was obtained in violation of his rights under the 5th and 14th amendments of the United States Constitution, as set forth by the Supreme Court in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966).

In State v. Thucos, 390 So. 2d 1281 (La. 1980) this court pointed out the necessity for "scrupulous honoring" of a defendant's assertion of his right to counsel, saying:

> "Before a confession or inculpatory statement can be admitted in evidence, it must be established that the accused who makes the statement during custodial interrogation was first advised of his Miranda rights and that the statement was made freely and voluntarily and not under the influence of fear, duress, intimidation, menaces, threats, inducements or



promises. Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966); R.S. 15:451. The Supreme Court in Miranda also stated: 'Once warnings have been given, the subsequent procedure is clear. . . . If the individual states that he wants an attorney, the interrogation must cease until an attorney is present.' Although it has been recognized that an accused may later change his mind and waive the same rights which he earlier asserted, [State v. Manning, 380 So. 2d 46 (La. 1980), and State v. Dominick, 354 So.2d 1316 (La. 1978)] once a defendant has invoked his constitutional right to remain silent or his right to counsel, the validity of any subsequent waiver depends upon the 'scrupulous honoring' of that right by the police, Michigan v. Mosely, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975); State v. Manning, supra. The state's burden here is a heavy one. State v. Mouton, 366 So. 2d 1336 (La. 1978); State v. Peevy, 321 So. 2d 324 (La. 1975). The courts indulge in every reasonable presumption against the waiver of fundamental constitutional rights. Brewer v. Williams, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977); Glasser v. U.S., 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942); State v. Manning, supra."

More recently, in Edwards v. Arizona, —— U.S. ——, 101 S.Ct. 1880, —— L.Ed. 2d —— (1981), the United States Supreme Court said:

> "Second, although we have held that after initially being advised of his Miranda rights, the accused may himself validly waive his rights and respond to interrogation, see North Carolina v. Butler, supra, 441 U.S., at 372-376, 99 S.Ct., at 1757-1759, the Court has strongly indicated that additional safeguards are necessary when the accused asks for counsel; *and we now hold that when an accused has invoked his right to have counsel present during cus-*

*todial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversations with the police.*" (Emphasis added.)

And after mentioning later cases dealing with the "undisputed right" under Miranda to remain silent and to be free of interrogation before consulting with a lawyer the court stated:

> "We reconfirm these views and to lend them substance, emphasize that *it is inconsistent with Miranda and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel.*" (Emphasis added.)

In a concurring opinion Justices Powell and Rehnquist indicated an uncertainty as to whether this decision really prohibited the police from initiating an inquiry as to whether a suspect has changed his mind about talking to them without an attorney. However, it seems quite clear to us that the majority of that court has so ruled.

In the present case it is undisputed that the police did initiate such an inquiry on July 3, after having been clearly informed by the defendant on the previous evening that he would not make any statements without counsel. Consequently, there was a violation of the additional standard governing police interrogation of a suspect imposed by Edwards v. Arizona, supra.

The state alternatively contends that if the court erred in this respect the error was harmless because there is overwhelming evidence of the defendant's guilt in the record of the Tuminello robbery case.



In State v. Gibson, 391 So. 2d 421 (La. 1980), this court adopted the harmless error rule applied in Chapman v. California, 386 U.S. 13, 87 S.Ct. 824, 17 L.Ed. 2d 705 (1967), saying:

> "It appears that the Chapman test, i.e., 'whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction' and that 'the court must be able to declare a belief that [the error] was harmless beyond a reasonable doubt,' will assist this Court to fulfill both of the requirements of state law.

From the record it seems quite possible that the jury could have convicted this defendant of the Tuminello robbery without consideration of the inculpatory statement in question. However, for reasons hereinafter set forth it is unnecessary for us to decide whether or not this error was harmless beyond a reasonable doubt.

We note that Edwards was rendered on May 18, 1981. Prior thereto, of course, law enforcement authorities were unaware of any prohibition against an officer asking a suspect, who had been warned of his Miranda rights and refused to give any information without counsel, whether he had changed his mind and was then willing to be interrogated without a lawyer. In this case Shea's inculpatory statement was obtained, his motion to suppress was tried and denied, he was tried and found guilty by a jury in one case, pled guilty in the other and he was sentenced for both offenses, all before the decision in Edwards was announced. Therefore, we are presented with the question of whether or not the rule of that case is to be applied retroactively.

The United States Supreme Court does not mention this subject in its decision. However, it has directed that Escobedo [2] and Miranda, both of which introduced new standards governing police interrogation as safe-

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[2] Escobedo v. State of Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed 977 (1964).

guards against the use of unreliable inculpatory statements, are not to be applied retroactively. Johnson v. State of New Jersey, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966), rehearing denied, 385 U.S. 890, 87 S.Ct. 12, 17 L.Ed.2d 121. In Johnson the court decided that such newly instituted standards did not "enhance the reliability of the fact-finding process" to the extent that inculpatory statements previously obtained without their application should be excluded from evidence when the statements were found reliable under the prior tests of voluntariness. We see no sound reason why this new standard for police interrogation imposed by Edwards in regard to obtaining a suspect's statement without counsel should or will be treated differently.

This court has taken the same position with respect to retroactive application of the Dino[3] rule, excluding statements given by minors without consultation with an attorney, parent or adult. State v. Collum, 365 So.2d 1272 (La. 1978), U.S. cert. den., 444 U.S. 882, 100 S.Ct. 171, 62 L.Ed.2d 111 (1979); State v. Kent, 391 So.2d 429 (La. 1981).

In the present case the trial judge determined that defendant Shea's oral statement was given freely and voluntarily after he was fully advised of his Miranda rights. We agree with the court's conclusion that it was admissible under the standards existing when it was taken and also when the matter was tried. We also find that the defendant voluntarily and intelligently waived the right to counsel and his privilege against self-incrimination before making the inculpatory statement. As this occurred before the decision in Edwards was rendered and we are convinced the United States Supreme Court will pronounce that decision is not retroactive, we so hold in this case.

This assignment of error lacks merit.

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[3] State in the Interest of Dino, 359 So.2d 586 (La. 1978), U.S. cert. den., Louisiana v. Dino, 439 U.S. 1047, 99 S.Ct. 722, 58 L.Ed.2d 706 (1978).



*ASSIGNMENT OF ERROR NO. 2 (BOTH CASES)*

The defendant contends the trial court erred in denying his motions to suppress evidence and the confession obtained as a result of the arrest by the police shortly after the Tuminello robbery. He argues that the officers did not have reasonable grounds to make this investigatory stop and search of the defendants under Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), and Article 215.1 of the Louisiana Code of Criminal Procedure.

Article 215.1 authorizes a police officer to stop a person in a public place for questioning when he reasonably suspects that person is committing, has committed or is about to commit a criminal offense. Reasonable cause for an investigatory stop or detention is something less than probable cause, which much exist for a police officer to arrest without a warrant for an offense committed outside his presence. La. C.Cr.P. Art. 213(3). However, the detaining officer making such stop must have articulable knowledge of particular facts sufficient reasonably to suspect the detained person of criminal activity. State v. Edsall, 385 So. 2d 207 (La. 1980).

Under the circumstances of this case we are convinced the police officers not only had reasonable cause for an investigatory stop but also had probable cause to arrest the defendant and his accomplice without a warrant. These two persons were in the immediate vicinity of the robbery within minutes after it occurred. They fitted the descriptions of the robbers broadcast on the police radio. They were heading away from the scene of the crime at a brisk pace. Instead of initially stopping as ordered, both suspects accelerated their paces and one of them reached toward his pocket as if to produce a weapon. Under somewhat similar facts this court upheld a stop, search and arrest in State v. Jackson, 337 So. 2d 508 (La. 1976). Also see State v. Kenner, 384 So. 2d 413 (La. 1980).

This assignment is without merit.

*ASSIGNMENT OF ERROR NO. 3 (BOTH CASES)*

This assignment is directed at the denial of defendant's motion to suppress out-of-court identification. Since it was neither argued nor briefed by the defendant, it should be considered as abandoned. State v. Kenner, supra. Nevertheless, we have reviewed the transcript of the pre-trial hearing of this motion and conclude that the physical line-up was properly conducted. It was not suggestive, conducive to a mistaken identification or tainted in any manner as would violate due process of law.

This assignment has no merit.

*ASSIGNMENT OF ERROR NO. 4 (81-KA-0377)*

In this assignment the defense contends that the trial court erred in denying its challenge for cause of prospective juror Nathaniel Willis on the grounds that the voir dire examination disclosed he was not impartial and would not accept the law as given by the court. La. C.Cr.P. Art. 797 (2 and 4).

Initially, while he recognized the presumption of innocence and the state's burden to prove guilt beyond a reasonable doubt, the juror indicated that he would expect the defendant to produce some evidence on his own behalf in order to find him not guilty. However, upon being further instructed by the trial judge in this respect and in response to additional questions, Mr. Willis said that "it would be kinda hard" but he could and would apply the law according to the court's instructions.

We believe the juror's initial answers in this instance were brought about more from a lack of understanding of the law than bias. From our review of the entire voir dire examination we are convinced of the juror's ability and willingness to decide the case impartially according to the law and evidence. We therefore conclude that the



trial judge did not abuse the broad discretion vested in him in ruling on this challenge for cause. State v. Sheppard, 350 So. 2d 615, 638 (La. 1977); State v. Sonnier, 379 So. 2d 1336, 1352 (La. 1980); State v. Bates, 397 So. 2d 1331, 1333 (La. 1981).

This assignment of error is without merit.

*ASSIGNMENT OF ERROR NO. 5 (81-KA-0377)*

This assignment involves the trial court's denial of defendant's motion for a mistrial on the ground that the prosecutor made a comment during the voir dire examination which referred to the possibility that the defendant would not take the stand and testify in his own defense. La. C.Cr.P. Art. 770. The remark was contained in the following question:

> "Miss Peters: The fact that the defendant doesn't have to do anything in his defense, but if the defendant elects to take the stand then that would be his right. Would you, Mrs. Hutchison, could you judge his credibility like any other witness?"

A similar argument was made in State v. Kenner, 336 So. 2d 824, 828 (La. 1976). It was rejected because of the defendant's failure to object or move for a mistrial at the time. However, this court went on to say:

> "In any event, the remarks were not a comment on the failure of defendant to take the stand, but only a statement that defendant might or might not present evidence. It has been held by this court that a prosecutor's statement that 'the evidence . . . was uncontradicted and uncontroverted' was not an impermissible comment on the accused's failure to take the stand. State v. Singleton, 321 So.2d 509 (La. 1975). Hence, we do not find that the prosecutor's remarks adversely affected defendant's due process rights in any way."

We reach the same conclusion in this instance. We do not consider the portion of the question objected to as a comment on the failure of the defendant to take the stand. Instead, the prosecutor merely mentioned the defendant's constitutional privilege not to do so and then directed a legitimate inquiry toward the weight to be accorded his statements if he should choose to testify.

This assignment is without substance.

*ASSIGNMENT OF ERROR NO. 6 (81-KA-0377)*

The defendant argues that the trial court erred in curtailing cross-examination of Detective John Snell, thereby denying him the opportunity to attack the credibility of this state witness by showing his bias.

The defendant's counsel attempted to ask the detective if taking statements helps the state in getting convictions. The state objected on the ground that the question called for an opinion or a conclusion and it was sustained. We agree with the trial court's ruling that the question called for an impermissible impression or opinion of a witness not shown to have special knowledge in that field. La. R.S. 15:463 and 464. Furthermore, we are unable to see how the defendant could have been prejudiced or harmed by such ruling.

This assignment has no merit.

*ASSIGNMENTS OF ERROR NOS. 7, 8 AND 9 (81-KA-0377)*

Since these assignments of error were neither argued nor briefed by the defendant, they will be considered abandoned. State v. Kenner, supra.

*ASSIGNMENTS OF ERROR NO. 10 (81-KA-0377) & ASSIGNMENT OF ERROR NO. 4 (81-KA-0378)*

Lastly, defendant Shea contends that his sentences are excessive. His principal complaint seems to be directed at the disparity between his consecutive sentences of 17



and five years and those of his accomplice Ratliff of two concurrent seven and one-half years sentences imposed pursuant to guilty pleas for the same robberies. Such comparison alone is not sufficient to establish an unconstitutional excessive sentence. State v. Bonanno, 373 So. 2d 1284, 1294 (La. 1979).

Ratliff's background is not in the record before us. However, we note that at the time of these offenses Shea was on probation for a felony theft convicted in Texas. He was the one who held the revolver and discharged it in the proximity of the victim Tuminello.

Before the 17 year sentence was imposed the trial judge ordered a pre-sentence investigation and permitted the defense to review the report. A pre-sentence hearing was held, after which the judge stated for the record in detail the considerations which he took into account and the factual bases for imposing sentence under the guidelines of La. C.Cr.P. Art. 894.1.

Under the circumstances and as armed robbery is one of the most serious crimes in Louisiana, for which the Legislature has provided a minimum sentence of five years and a maximum of 99 years, without benefit of parole, probation or suspension of sentence, it is quite clear to us that the trial judge did not abuse his wide discretion in sentencing this defendant to serve 17 years at hard labor for the Tuminello robbery.

The defendant also contends that the five year sentence imposed in the other case is excessive inasmuch as the trial judge ordered that it be served consecutive to his 17 year sentence. He argues that the second sentence should have been made to run concurrently under La. C.Cr.P. Art. 883, because the two offenses constituted parts of a common scheme or plan. We disagree. These two robberies occurred four days apart and were separate crimes. But even if they were considered a single course of criminal conduct, Article 883 is not phrased in mandatory terms. More important, the five year sentence in the Quick Mart robbery case was imposed pursuant to a

plea bargain to which the defendant, the district attorney and the judge had agreed. Consequently, he is precluded from complaining of excessiveness of that sentence before this court. State v. Curry, 400 So. 2d 614 (La. 1981). Also, it appears that the only condition to the defendant's guilty plea was the reservation of his rights to appellate review of the trial court's ruling on his motion to suppress.

These assignments of error therefore lack merit.

For the foregoing reasons, the convictions and sentences are affirmed.

AFFIRMED.

CALOGERO, J., filed concurring opinion.

DENNIS, J., dissented.



SUPREME COURT OF LOUISIANA

No. 81-KA-0377 c/w
No. 81-KA-0378

STATE OF LOUISIANA

*versus*

KEVIN SHEA

CALOGERO, Justice, concurring.

The majority finds that Edwards v. Arizona —— U.S. ——, 101 S.Ct. 1880 (1981), prohibits the police from initiating an inquiry as to whether a suspect, who earlier chose not to talk without an attorney, had changed his mind. I am not convinced that Edwards v. Arizona stands for that proposition. *Edwards* probably should be construed more narrowly than that in my opinion.

The majority determines that Edwards v. Arizona should be applied only prospectively. I am not convinced that this is correct. In my mind the *Edwards* opinion may well enhance the truth finding process, as opposed to simply creating a prophylactic deterrence of police activity.

For the reason first above stated I concur in the majority's affirmance of defendant's conviction and find in this case no need to decide the retroactive/prospective question. Defendant's statement of July 3, 1979, was not improperly admitted in evidence. Defendant neither asked for counsel nor "expressed his desire to deal with police only through counsel." Edwards v. Arizona, *supra*. An informed accused may waive his rights to silence and to counsel and respond to interrogation. North Carolina v. Butler, 441 U.S. 372, 376, 99 S.Ct. 1757, 1759 (1979).

This case is different from our recent State v. West, —— So.2d —— (La. 1982), No. 81-KA-0675, where defendant had been advised by *his* attorney to make no statement to police, the police officers were fully aware of that fact, and they took a statement from him nonetheless.

SUPREME COURT OF LOUISIANA

No. 81-KA-0377
c/w
No. 81-KA-0378

STATE OF LOUISIANA

*v.*

KEVIN MICHAEL SHEA

OPINION ON REHEARING—October 18, 1982

MARCUS, Justice

We granted a rehearing in this case to reconsider our decision that the trial court correctly refused to suppress defendant's inculpatory statement.

In *Miranda v. Arizona*, 384 U.S. 436 (1966), the United States Supreme Court held that the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation unless the accused is first advised of, and subsequently waives, his right to remain silent and right to the presence of an attorney.[1] However, it was not clear from *Miranda* the standard to be applied in determining whether a person in custody has waived these rights.

*Michigan v. Mosley*, 423 U.S. 96 (1975), sought to answer *Miranda*. Mosley was arrested in connection with two robberies and was advised of his *Miranda* rights. Mosley subsequently informed the police that he did not wish to answer any questions about the robberies, whereupon the police ceased the interrogation. After an interval of approximately two hours, Mosley was taken by police to a different interrogation room and was again

[1] Specifically, the accused must be warned that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.



given his *Miranda* warnings. In addition, he signed a waiver of rights form. The police then told Mosley that he had been implicated in a homicide. Mosley then made a statement implicating himself in the homicide. The Court held:

> [T]he admissibility of statements obtained after the person in custody has decided *to remain silent* depends under *Miranda* on whether his rights to cut off questioning was *scrupulously honored*. 423 U.S. at 104. (Emphasis added.)

The Court, finding that Mosley's "right to cut off questioning" was fully respected, held that the admission in evidence of his incriminating statement did not violate the principles of *Miranda*. However, the Court observed in footnote 7 that:

> The present case does not involve the procedures to be followed if the person in custody asks to *consult with a lawyer*, since Mosley made no such request at any time. Those procedures are detailed in the *Miranda* opinion. . . . (Emphasis added.)

The Court gave no reasons for distinguishing between the right to remain silent and the right to counsel. Thus, *Mosley* did not resolve the issue of whether the police could resume questioning of an accused following his invocation of the right to counsel.

Without an express statement of law on this issue, lower federal courts reached varied results. It appears that a majority of the courts did not make a distinction between the right to counsel and the right to remain silent. In so doing, the courts either used the "scrupulously honor" test[2] of *Mosley* or the "knowing and intel-

[2] *See* United States v. Rodriguez-Gastelum, 569 F.2d 482 (9th Cir.), *cert. denied*, 436 U.S. 919 (1978); United States v. Collins, 462 F.2d 792 (2d Cir.), *cert. denied*, 409 U.S. 988 (1972).

ligent waiver" test [3] as dictated in *Johnson v. Zerbst*, 304 U.S. 458 (1938).[4] A minority of the courts [5] applied a per se rule against further police interrogation once the accused invoked his right to counsel.

This court, when confronted with the issue, that is, whether the police can resume questioning of an accused following his invocation of the right to counsel, seems to have adopted the "scrupulously honor" test. *State v. Thucos*, 390 So. 2d 1281 (La. 1980); *State v. Manning*, 380 So. 2d 46 (La. 1980).

In *Manning*, defendant was arrested at 11:50 a.m., given his *Miranda* warnings and taken to the police station. At the station at 2:25 a.m., he signed a waiver of rights form. Later at 5:03 a.m., while the officer was asking Manning if he understood his *Miranda* rights, he stated that he wanted an attorney. Questioning immediately ceased and defendant was told that an attorney would be made available to him. As the officers began preparing to leave the interrogation room, defendant announced that he did not need an attorney and that he wanted to "clear the air." Manning then made a statement at 5:08 a.m. (about five minutes after he had

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[3] *See, e.g.*, United States v. Grant, 549 F.2d 942 (4th Cir.), *cert. denied*, 432 U.S. 908 (1977); Cobbs v. Robinson, 528 F.2d 1331 (2d Cir. 1975), *cert. denied*, 424 U.S. 947 (1976).

[4] In Johnson v. Zerbst, 304 U.S. 548 (1938), the Supreme Court held:

> A waiver is ordinarily an intentional relinquishment of a known right or privilege. The determination of whether there has been an intelligent waiver . . . must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.

*Accord, e.g.*, Fare v. Michael C., 442 U.S. 707 (1979); North Carolina v. Butler, 441 U.S. 369 (1978).

[5] *E.g.*, United States v. Massey, 550 F.2d 300 (5th Cir. 1979); United States v. Clark, 499 F.2d 802 (4th Cir. 1972); United States v. Priest, 409 F.2d 491 (5th Cir. 1969).



invoked his right to counsel). Under these facts, we conclude that Manning's *Miranda* rights had not been violated.

In *Thucos*, defendant was arrested about midnight, advised of his *Miranda* rights, and taken to the stationhouse where he was again informed of his rights. He elected not to sign the waiver of rights form and stated that he did not want to talk and that he would like to see an attorney. The officers allowed defendant to make a call but testified that they did not know whether he reached an attorney or not. Thereafter, defendant was brought to his cell. Later that morning, at 9:00 a.m. (some nine hours after invocation of his right to counsel), defendant was brought to the interrogation room and interrogated. Thucos was again advised of his *Miranda* rights, signed a waiver of rights form, and made an oral inculpatory statement. Defendant was then returned to his cell. The next morning, he was once again taken from his cell to the interrogation room where he was advised of his rights. A second inculpatory statement was then made by defendant. Under these facts, we concluded that Thucos' rights had not been "scrupulously honored" and thus his statements were inadmissible. In distinguishing *Manning*, we stated:

> The officer's initiation of further questioning in this case, after defendant had asserted his right to be silent and right to have counsel present during questioning, is fatal to the admissibility of the statements made by the defendant.

Whether an accused's rights are "scrupulously honored" should depend on the particular facts of each case. Stated another way, it depends on the totality of the circumstances. The fact that the officer initiates further questioning after the accused has invoked his right to counsel should be only one of the factors considered in determining whether his right to counsel has been "scrupulously honored." Other factors, such as the time delay

between the original request and subsequent interrogation, whether *Miranda* warnings were given before each separate interrogation, whether waiver of rights forms were signed, and whether or not pressures were asserted on the accused by the police between the time he invoked his right to counsel and the subsequent interrogation, should be considered in making this determination. In *Thucos*, we most probably placed too much emphasis on the officer's initiation of further questioning in reaching our conclusion.[6]

In the instant case, Shea was arrested on the afternoon of July 2, 1979, and was fully advised of his *Miranda* rights. He was taken immediately to the police station where he was again advised of his rights. He also signed a waiver of rights form. Shea told the detectives (Snell and Smith) that he did not want to talk about the case until he had seen an attorney. The interview was immediately terminated. After an interval of some twenty-four hours, Snell returned and told Shea that he was about to be transferred. Snell asked Shea if he wanted to talk about the case. Snell readvised Shea of his *Miranda* rights and defendant again signed a waiver of rights form. Shea then made a statement about his involvement in the robberies. Under the totality of the circumstances, we consider that Shea's right to counsel was "scrupulously honored." Hence, his inculpatory statement is admissible in evidence.

On May 18, 1981, *Edwards v. Arizona*, —— U.S. ——, 101 S.Ct. 1880 (1981), was decided. *Edwards* held that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing

[6] In *Edwards v. Arizona*, —— U.S. ——, 101 S.Ct. 1880 (1981) (discussed fully later in this opinion), initiation was made the crucial factor to be considered. However, at the time of the decision in *Thucos*, *Edwards* had not been decided and for reasons to be discussed later, we hold that *Edwards* is non-retroactive.



only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. The Court further held that an accused, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversations with the police.

In the instant case, Shea invoked his right to counsel. Counsel was never made available to him nor did Shea initiate further communication with the police. To the contrary, the police re-initiated further conversations with him. Hence, under *Edwards*, the resumption of interrogation was not a product of a voluntary waiver and therefore the statement would be inadmissible.

However, Shea's statement was made on July 3, 1979, some ten months prior to the *Edwards* decision (May 18, 1981). The issue then is whether *Edwards* should be given retroactive effect.[7] We think not.

In *United States v. Johnson*, —— U.S. ——, 102 S.Ct. 2579 (1982), the Supreme Court stated:

> Where the Court has expressly declared a rule of criminal procedure to be a "clear break with the past," it almost invariably has gone on to find such a newly-minted principle non-retroactive.

The *Edwards* Court, upon announcing its new ruling, stated, "We *now* hold . . ." (emphasis added), which indicates that the Court felt that this holding was breaking new ground in the area of police procedure. The ruling

[7] Shortly after *Edwards* was decided, the Supreme Court granted certiorari in a number of cases which were apparently pending on direct review in that Court, vacated the judgments and remanded for further consideration in light of *Edwards*. This action does not mean that the Supreme Court will ultimately decide to give full retroactive effect to *Edwards*.

was unanticipated.[8] Law enforcement authorities had relied on the old standards. In the instant case, the police did not know that once Shea requested counsel, further interrogation must cease until counsel had been made available to him, unless he (Shea) initiated further communication himself. The rule, therefore, as pronounced in *Edwards* is a "clear break with the past" and thus is non-retroactive.

In sum, the trial court correctly refused to suppress defendant's inculpatory statement.

*DECREE*

For the reasons assigned, our original opinion is reinstated.

DIXON, C.J., dissented.

CALOGERO, J., filed dissenting opinion.

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[8] "In the course of making that holding [Edwards], Justice White established a *new prophylactic rule*." The Supreme Court, 1980 Term, 95 Harv.L.Rev. 127 (1981-82) (emphasis added).

"The instant majority, by establishing the *new* per se rule, went beyond what was necessary to exclude the confession. . . . This *new* rule protects the suspect's choice to be free from interrogation until he consults with counsel. . . . The Court could have at least noted that its *new rule* was not the most faithful reading of *Miranda*." 33 U. Fla. L. Rev. 788, 797 (1981) (emphasis added).

"The Court instead seized upon the opportunity to announce a broad prophylactic rule in direct opposition to the previous trend toward limiting the scope of *Miranda*." 23 Ariz. L. Rev. 1391, 1400 (1981).



SUPREME COURT OF LOUISIANA

No. 81-KA-0377
c/w 81-KA-0378

STATE OF LOUISIANA

*versus*

KEVIN MICHAEL SHEA

October 19, 1982

CALOGERO, Justice, dissenting.

I dissent from the majority opinion. In State v. Thucos, 390 So.2d 1281 (La. 1980) this Court held that inculpatory statements made by the defendant had to be suppressed where defendant had asserted his right to consult with an attorney but was nevertheless again questioned by police officers before he had an opportunity to do so. Under those circumstances, we found that the state had not met its burden of proving that the defendant's assertion of his right to an attorney had been "scrupulously honored." The instant case is indistinguishable from *Thucos*. Accordingly, the inculpatory statements made by this defendant pursuant to questioning initiated by the police officers after defendant had asserted his Miranda rights and requested an opportunity to consult with an attorney should likewise have been suppressed.

The majority opinion correctly states that the United States Supreme Court held, in Miranda v. Arizona, 384 So.2d 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), that the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation unless the accused is first advised of, and subsequently waives, his right to remain silent and his right to the presence of an attorney. However, the majority falls into error when it finds that *Miranda* did not make

clear, under the circumstances involved in this case, the standard to be applied in determining whether a person in custody waived these rights.

*Miranda* might not have made clear the standard to be applied in a situation where the accused merely chooses to remain silent (as opposed to asserting his right to consult an attorney). Michigan v. Mosley, 423 U.S. 96, 96 S.Ct., 321, 46 L.Ed.2d 313 (1975). However, on the question of what procedure should be utilized where the accused asserts his right to counsel, the Court in *Miranda* specifically stated:

> Once warnings have been given, the subsequent procedure is clear. . . . If the individual states that he wants an attorney, the interrogation must cease until an attorney is present.

I fail to see what the majority finds unclear about this standard as it relates to this case. In fact, fully aware of these expressions by the high court, this Court held, in State v. Thucos, *supra*, that where the defendant had requested to see an attorney before answering questions, and the officers had again initiated questioning the following day without the defendant's having consulted with an attorney in the interim, the state had not met its burden of proving that the defendant's rights had been "scrupulously honored." We found the *Thucos* case to be distinguishable from our earlier decision in State v. Manning, 380 Co.2d 46 (La. 1980), where it was found that the defendant's rights had been "scrupulously honored" because the defendant was the one to initiate communications with the officers after previously asserting his rights.

Yet the majority finds that *Thucos* is not dispositive of this case because other factors should be considered (other than that the defendant asserted his right to counsel and was nevertheless again questioned by the officers) in determining whether a defendant's rights were scrupulously honored, and because "we most probably placed



too much emphasis on the officer's initiation of further questioning in reaching our conclusion" in *Thucos*. I find it difficult to understand how the majority can conclude that our emphasis might have been misplaced in *Thucos*, since, not six months later, the United States Supreme Court in Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981) came down with the exact same result, likewise placing its emphasis on the defendant's assertion of his right to counsel coupled with the initiation by the officers of further questioning. The Court in *Edwards* held:

> [A]lthough we have held after initially being advised of his Miranda rights, the accused may himself validly waive his rights and respond to interrogation, see North Carolina v. Butler, *supra*, 441 U.S., at 372-376, 99 S.Ct., at 1757-1759, the Court has strongly indicated that additional safeguards are necessary when the accused asks for counsel; and we now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversations with the police. (Emphasis added.)

Perhaps the majority feels that the United States Supreme Court has misplaced its emphasis also. However, that is not a question for our determination. Therefore, whether *Edwards* is retroactive or not, the majority falls into serious error in cutting back on the standard set out in *Thucos*, where the identical position has since been taken by the United States Supreme Court.

Finally, the majority finds that *Edwards* should not be given retroactive effect because it created a new rule. While it is arguable whether *Edwards* created a "new" rule at all (to be discussed further below) in view of its reliance on *Miranda*, it certainly is clear that it did not create a "new" rule in Louisiana since we had previously rendered the *Thucos* decision on the same issue with the same result.

Furthermore, I believe that Edwards v. Arizona, *supra*, should be given retroactive effect. Although the United States Supreme Court has not specifically addressed the issue of prospective/retrospective application of *Edwards*, its actions clearly indicate that *Edwards* is not to be applied prospectively only. One week after handing down *Edwards*, the United States Supreme Court granted certiorari in six cases which involved the same issue. In each case, the petitioner was a defendant whose statement had been ruled admissible by the trial court and whose conviction had been affirmed on appeal. Blakney v. Montana, 451 U.S. 1013, 101 S.Ct. 2999, 69 L.Fd.2d 384, (1981);[1] White v. Finkbeiner, 451 U.S. 1013, 101 S.Ct. 3000, 69 L.Ed.2d 385, (1981);[2] Leuschner v. Maryland, 451 U.S. 1014, 101 S.Ct. 3001, 69 L.Ed.2d 385, (1981);[3] Monroe v. Idaho, 451 U.S. 1014, 101 S.Ct. 3001, 69 L.Ed.2d 385, (1981);[4] Wantland v. Maryland, 451 U.S. 1014, 101 S.Ct. 3001, 69 L.Ed.2d 386 (1981);[5] and James v. Illinois, 451 U.S. 1014, 101 S.Ct. 3001, 69 L.Ed.2d 385 (1981).[6] One month later the Court followed this same procedure in Williams v. Ohio, 452 U.S. 935, 101 S.Ct. 3073, 69 L.Ed.2d 949 (1981).[7] The Court

[1] 605 P.2d 1093 (Mont. 1979).

[2] 611 F.2d 186 (7th Cir. 1979).

[3] 45 Md.App. 323, 413 A.2d 227 (1980).

[4] 101 Idaho 251, 611 P.2d 1036 (1980).

[5] 413 A.2d 1376 (Ct. Spec. App. Md. 1980).

[6] 82 Ill. App. 3d 551, 37 Ill. Dec. 934, 402 N.E.2d 936 (1980).

[7] No cite below reported.



vacated the judgments and remanded the cases to the courts below for "further consideration in light of Edwards v. Arizona." This procedure is contrary to that adopted by the Court following its decision in *Miranda*. Johnson v. New Jersey, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966), decided one week after *Miranda*, directed that *Miranda* would apply only to cases in which the trial began after the date of the *Miranda* decision.

The belief that *Edwards* is to be applied to this case is further supported by People v. Paintman, 412 Mich 518, 315 N.W.2d 418 (1982), in which the Michigan Supreme Court, relying upon *Edwards*, ruled that Paintman's pre-*Edwards* statement was inadmissible. The state of Michigan sought certiorari. The United States Supreme Court denied the application. —— U.S. ——, 102 S.Ct. ——, 50 L.W. 3935 (May 24, 1982). Accord: Connecticut v. Smith, —— U.S. ——, 102 S.Ct. 1441 (1982).

Actually, the question whether to accord retroactive or prospective application to a decision of the United States Supreme Court only arises when that Court announces a *new* rule. Johnson v. United States, —— U.S. ——, 102 S.Ct. ——, 31 Cr.L. 3100 (decided June 21, 1982); Brown v. Louisiana, 447 U.S. 323, 100 S.Ct. 2214, 65 L.Ed.2d 159 (1980); Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 1601 (1965); Battie v. Estelle, 655 F.2d 692 (5th Cir. 1981). In my view, *Edwards* announces no new rule regarding the admissibility of statements obtained by the police after a defendant has invoked his right to counsel. The United States Supreme Court in *Edwards* specifically stated that the use of Edwards' confession at trial "violated his rights under the Fifth and Fourteenth Amendments *as construed in Miranda*." 451 U.S. at 480, 101 S.Ct. at 1882 (emphasis supplied). Noting that *Miranda* required that once an accused asserted his right to counsel, "the interrogation must cease until an attorney is present," the Court briefly discussed cases after *Miranda* which applied the dictates

of *Miranda* to the particular facts presented in those cases. The Court then concluded:

> We reconfirm these views and to lend them substance, emphasize that it is inconsistent with *Miranda* and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel. 451 U.S. at 485, 101 S.Ct. at 1885.

Therefore, because I think Edwards v. Arizona, *supra*, should be applied retroactively, and in any event, State v. Thuchos, *supra*, is dispositive of the issue, holding that questioning is not to be initiated by police once the defendant has asserted his right to counsel until counsel has been made available to him, I dissent from the majority opinion.



SUPREME COURT OF THE UNITED STATES

No. 82-5920

KEVIN MICHAEL SHEA, PETITIONER

*v.*

LOUISIANA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

April 30, 1984

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No. 82-5920

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

KEVIN MICHAEL SHEA,

*Petitioner,*

v.

STATE OF LOUISIANA,

*Respondent.*

**On Writ Of Certiorari To The Supreme Court of Louisiana**

## BRIEF OF PETITIONER

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## QUESTION PRESENTED

Whether the rule first announced in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and most recently reiterated in *Edwards* v. *Arizona*, 451 U.S. 477 (1981), that the Fifth and Fourteenth Amendments require suppression of statements made after a defendant has invoked his right to counsel during custodial interrogation, applies to Petitioner Shea's conviction which was not yet final at the time *Edwards* was decided.

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## OPINIONS BELOW

The opinions of the Supreme Court of Louisiana on original hearing and rehearing appear in the Joint Appendix and are reported with the following citation: *State* v. *Shea*, 421 S.2d 200 (La. 1982).

## JURISDICTIONAL STATEMENT

The judgment of the Louisiana Supreme Court on rehearing was rendered on October 18, 1982. The Petition For Writ of Certiorari was filed on December 17, 1982, within the time set by Rule 20.1 of the Rules of the Supreme Court. The Petition For Writ of Certiorari was granted on April 30, 1984. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

## CONSTITUTIONAL AND CODAL PROVISIONS

The Fifth Amendment to the Constitution of the United States provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to twice be put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

The Fourteenth Amendment to the Constitution of the United States provides in Section One as follows:

> All persons born or naturalized in the United States and subject to the jursidiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the

citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Louisiana Code of Criminal Procedure, Article 922, provides in pertinent parts;

> A. Within fourteen days of rendition of the judgment of the supreme court, in term time or out, a party may apply to the supreme court for a rehearing. The court may act upon the application at any time.
>
> B. A judgment rendered by the supreme court becomes final when the delay for applying for a rehearing has expired and no application therefor has been made.

**STATEMENT OF THE CASE AND PROCEDURAL HISTORY**

After trial by jury in state district court in Caddo Parish, Louisiana, the Petitioner, KEVIN MICHAEL SHEA, was convicted of the offense of armed robbery (La. R.S. 14:64) (Criminal No. 111,684-A). He pled guilty to a second count of armed robbery and reserved his right to appeal the denial of his motion to suppress inculpatory statements under *State of Louisiana* v. *Crosby*, 338 So.2d 584 (La. 1976) (Criminal No. 111,684). He was sentenced to consecutive sentences of seventeen years at hard labor on the first conviction and five years imprisonment at hard labor on the second.

The Petitioner was arrested on July 2, 1979. He was taken to the Shreveport Police Station, where he was turned over to Detectives Smith and Snell for questioning. The Petitioner was read his *Miranda* rights and he signed the standard *Miranda* card. Petitioner stated that he did not want to make any statements until he saw a lawyer. The interview was terminated at that point.



The following afternoon, before Petitioner had consulted with an attorney, Detective Snell returned to the Shreveport City Jail, where he told Petitioner that he was to be transferred to the parish jail. Without inquiring of Shea whether he had spoken with an attorney and without any indication from Shea that he wanted to be re-interrogated, Snell asked him if he wanted to talk about the case. After being readvised of his rights and signing the *Miranda* rights card, Shea gave a statement in which he confessed to committing the robberies.

The two charges of armed robbery were severed for trial purposes. Prior to both scheduled trials, Petitioner filed a Motion To Suppress the confessions. (J.A. 1). Subsequently notice of intent to use the Petitioner's statements was filed by respondent (J.A. 1). At trial on Charge No. 111,684-A, held in April, 1980, the State introduced the oral confession given by the Petitioner on July 3rd. As the State sought to lay the foundation for the admissibility of the confession, the Petitioner objected to its admissibility on the grounds that there had not been compliance with *Miranda* procedures. The trial court overruled the objection, finding that the Petitioner had waived his right to counsel. (J.A. 1). Petitioner was found guilty of armed robbery at the conclusion of the trial. In December, 1980, Petitioner moved to suppress the inculpatory statements as they related to Charge No. 111,684. (J.A. 1). The motion was denied. (J.A. 1). Petitioner then withdrew his original plea and entered a plea of guilty with a reservation of his right to appeal the denial of his motion. (J.A. 1).

On appeal to the Louisiana Supreme Court, Petitioner raised the issue of the trial court's error in admitting the confession into evidence at trial and the subsequent denial of the Motion To Suppress. (J.A. 14). In its original opinion, dated January 25, 1982, that Court recognized

that there had been a violation of the standard governing police interrogation as set forth in *Edwards* v. *Arizona*, 451 U.S. 477 (1981). (J.A. 16). The Court went on to hold, however, that *Edwards*, decided on May 18, 1981, was not retroactive and, therefore, did not apply to Petitioner's statements made in July of 1979. (J.A. 18).

Petitioner applied for a rehearing with the Louisiana Supreme Court on the issue of retroactivity. The rehearing was granted. On October 18, 1982, the Court again held that *Edwards* was not retroactive. (J.A. 32). That decision became final on November 1, 1982, after the expiration of fourteen days from the issuance of the opinion. (La. Code of Criminal Procedure, Art. 922).

## SUMMARY OF ARGUMENT

This case presents the question left unanswered by the Court's recent decision in *Solem* v. *Stumes*, ____ U.S. ____; 104 S.Ct. 1338 (1984). Petitioner Shea's conviction was on direct appeal to the Louisiana Supreme Court when the Court announced the decision in *Edwards* v. *Arizona*, 451 U.S. 477 (1981). In *Solem* the Court held that *Edwards* is not to be applied retroactively to cases on collateral review. Petitioner submits that for the reasons discussed herein, limited retrospective application is appropriate.

Under the criteria established for determining retroactivity and its varying degrees, *Edwards* should apply to Petitioner's conviction. *See: Stovall* v. *Denno*, 388 U.S. 293 (1967). Distinctions between the scope of collateral review and direct appeal warrant the differing degrees of retroactivity. *See: Linkletter* v. *Walker*, 381 U.S. 618 (1965). Furthermore, the principles announced in *Edwards* create an exception to the former rigid *per se* rule of *Miranda* concerning police conduct during custodial interrogation. The case does not present a classic "new



rule;" nonetheless the Court concluded in *Solem* that it did, though not a "clear break" rule. The "new rule" of *Edwards* substantially enhances the integrity of the truth-finding process because it provides an accused the utmost protection from coercive police practices. It preserves his right to counsel which is indispensable to the guarantee of one's Fifth Amendment privilege against self-incrimination. The critical role played by the attorney in a custodial environment has been discussed time and again by the Court. It is an integral ingredient in assuring accuracy and integrity in the criminal justice system.

Reliance on "old standards" is an inappropriate consideration with respect to *Edwards*. The "old standards," if properly construed under *Miranda* and progeny, required even more than that set forth in *Edwards*. Furthermore, numerous cases after *Miranda* reiterated the "clear" and "*per se*" rule of *Miranda* that once a person in custody asserts the right to counsel interrogation must cease. There was no room for doubt as to what the proper procedures were. *See: Michigan* v. *Mosely*, 423 U.S. 96 (1975); *Fare* v. *Michael C.*, 442 U.S. 707 (1979); *Rhode Island* v. *Innis*, 446 U.S. 291 (1980).

The criminal justice system and the efficient administration of it will not suffer as a result of the Court holding in this case that *Edwards* applies to Petitioner Shea's case. The number of cases that will be affected pales into insignificance when compared to the volume of cases that would have been affected by complete retroactivity rejected by the Court in *Solem* in large part for that very reason. Furthermore, numerous jurisdictions, both state and federal, have already applied *Edwards* to factual situations that arose prior to *Edwards*.

All factors considered, the Court should hold that *Edwards* applies to convictions that were not yet final in May 1981.

## ARGUMENT

### I. Petitioner Shea's Statements Were Obtained In Violation Of His Fifth And Fourteenth Amendment Rights, Protection Of Which Is Further Guaranteed Under *Miranda* v. *Arizona* And Progeny.

During the initial interrogation at the police station immediately after his arrest, after having been advised of his rights, including the right to remain silent and to consult an attorney, Shea told Detectives Snell and Smith that he did not wish to make a statement until he had consulted an attorney. At that point the interrogation ceased.

The next day, Detective Snell encountered Shea for the second time when he returned to the city jail to transfer Shea to the parish facility. Knowing that Shea had asserted his right to speak to an attorney and without inquiring whether the opportunity to do so had been afforded him yet, Detective Snell immediately asked Shea if he wanted to talk about the case. (J.A. 13, 30). This question, during an encounter instigated by Snell, constituted "[a] practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amount[ing] to interrogation." *Rhode Island* v. *Innis*, 446 U.S. 291, 301 (1980). Shea subsequently gave incriminating statements after being readvised of his rights and signing a waiver card.

Interrogation of a person in custody after that person has stated his intention to remain silent until he has consulted an attorney violates the Fifth and Fourteenth Amendments and the procedures designed by the Court to protect the rights afforded therein. Once a person



under custodial interrogation "indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking, there can be no more questioning." *Miranda* v. *Arizona*, 384 U.S. 436, 444-445 (1966). The Fifth Amendment prohibits compelling a person to be a witness against himself and "any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise." *Id*, 384 U.S. at 474. Interrogation cannot resume until an attorney is present or the suspect initiates conversation and subsequently knowingly and intelligently waives his privilege against self-incrimination and right to counsel. First announced in 1966, "later cases have not abandoned that view." *Edwards* v. *Arizona*, 451 U.S. 447, 485 (1981).

### II. The Decision Announced In *Edwards* v. *Arizona* Should Apply To Petitioner Shea's Conviction Which Was Not Yet Final At The Time *Edwards* Was Decided.

#### A. The criteria for determining retroactivity of prior decisions encompasses several considerations, including whether the case presently before the Court is on direct appeal or under collateral review.

Retroactivity of judicial decisions is neither compelled by nor prohibited by the Federal Constitution. However, "[a]s a rule, judicial decisions apply 'retroactively.'" *Solem* v. *Stumes*, ___ U.S. ___; 104 S.Ct. 1338, 1341 (1984), quoting from *Robinson* v. *Neil*, 409 U.S. 505, 507-508 (1973). Varying degrees of retroactivity have been established as a result of the innumerable cases in which the Court has addressed the issue. New decisions may be given total retroactive application to all prior cases or limited application only to those where the judgment is not yet final, or those where the trial has not yet

begun. The criteria for determining where to draw the line in matters of criminal law are:

> (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards.

*Stovall* v. *Denno*, 388 U.S. 293, 297 (1967).

The foremost consideration is the purpose to be served by the new rule. *Brown* v. *Louisiana*, 447 U.S. 323 (1980). Reliance on the old rule and the impact of retroactivity on the administration of justice come into play only "when the degree to which the rule enhances the integrity of the factfinding process is sufficiently small." *Hankerson* v. *North Carolina*, 432 U.S. 233, 243 (1977). Furthermore, the impact of retroactivity is not persuasive where the constitutional error at issue "presents a serious risk that the issue of guilt or innocence may not have been reliably determined." *Roberts* v. *Russell*, 392 U.S. 293, 295 (1968).

In *Solem* v. *Stumes*, ___ U.S. ___; 104 S.Ct. 1338 (1984), the Court held that *Edwards* v. *Arizona* did not apply retroactively to cases on collateral review. The question was left open as to application to cases like Shea's where the conviction was not yet final. The distinctions between the scope of the writ of habeas corpus (the avenue pursued in *Solem*) and direct appeal (Petitioner Shea's position) justify differing degrees of retroactivity, as recognized by Justice Powell in his concurring opinion in *Solem*, 104 S.Ct. at 1346-1348.

When a conviction is reviewed on habeas, one looks to the law in effect at the time of conviction. "[C]orrect application of . . . [that existing law] is all that is required to 'forc[e] trial and appellate courts . . . to toe the constitutional mark.' [*Mackey* v. *U. S.*, 401 U.S. 667 at 687.]" *Solem* v. *Stumes*, 104 S.Ct. at 1347 (J. Powell concurring). On the other hand, when reviewing a case on direct appeal one looks to the law as it exists at the time of review.



The origin of the distinction between what law controls on direct appeal as opposed to habeas proceedings dates back to *United States* v. *Schooner Peggy*, 1 Cranch 103, 110; 2 Led 49, 51 (1801), where Chief Justice Marshall, writing for the Court, stated:

> It is the general rule that the province of an appellate court is only to enquire whether a judgment when rendered was erroneous or not. But if subsequent to the judgment and before the decision of the appellate court a law intervenes and positively changes the rule which governs, the law must be obeyed or its obligation denied . . . [and] where individual rights . . . are sacrificed for national purposes . . . the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside.

More recently, the decision in *Linkletter* v. *Walker*, 381 U.S. 618 (1965), wherein the Court discussed *Schooner Peggy*, establishes that under Supreme Court precedent "a change in law will be given effect while a case is on direct review." *Id.* at 627.

In *United States* v. *Johnson*, 457 U.S. 537 (1982), the following statement quoted from *Stovall* v. *Denno*, 388 U.S. 293, 300 (1967) was interpreted as an indication of departure from the principles discussed above:

> . . . no distinction is justified between convictions now final . . . and convictions at various stages of trial and direct review.

457 U.S. at 546; 102 S.Ct. at 2584. Such an interpretation results only when the statement is taken out of the con-

text in which it was written. In the context in which the statement was written the distinction was found to be unjustified because of the overriding significance of reliance on old standards and the overwhelming burden on the administration of justice, as evidenced by the several qualifying words omitted when the Court in *Johnson* quoted from *Stovall:*

> We also conclude that, *for these purposes*, no distinction is justified between convictions now final, as in the instant case, and convictions at various stages of trial and direct review. We regard the factors of reliance and burden on the administration as entitled to *such overriding* significance as to make that distinction unsupportable.

388 U.S. at 300 (emphasis added). That conclusion is inapplicable to the case at bar where, as discussed in detail in subsequent sections of this brief, those factors are insignificant and inappropriate.

*Edwards* was decided on May 18, 1981. The original decision of the Louisiana Supreme Court on Shea's appeal was rendered on January 25, 1982 (J.A. 12), eight months after *Edwards*. The rehearing decision did not appear until October, 1982 (J.A. 26), nine months later and seventeen months after *Edwards*.

**B. The integrity of the truth-finding process is substantially enhanced by the principles reiterated in *Edwards* v. *Arizona*.**

"[C]onfessions are likely to be highly persuasive with a jury, and if coerced they may well be untrustworthy by their very nature." *Johnson* v. *New Jersey*, 384 U.S. 719, 729 (1966). For this reason the Court has outlined with specificity the procedures to be followed in order to avoid coerced confessions and violations of one's Fifth Amendment privilege against self-incrimination. The *Miranda*



safeguards are intended to give a suspect "an added measure of protection against coercive police practices . . ." *Rhode Island* v. *Innis*, 446 U.S. 291, 301 (1980). *Miranda* was concerned with " 'the interrogation environment created by the interplay of interrogation and custody . . .' " *Id* at 299. That concern was succinctly stated by the Court in *Miranda:*

> The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators . . .
>
> * * *
>
> If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent.

384 U.S. at 469, 474.

The importance of the right to be free from self-incrimination as guaranteed by the Fifth and Fourteenth Amendments is clear. And while "[t]he fact that a suspect has requested a lawyer does not mean that statements he makes in response to subsequent police questioning are likely to be inaccurate," *Solem*, 104 S.Ct. at 1342, the pivotal role of the attorney in insuring that they are not has long been recognized. His responsibility for seeing that the rights of an accused are protected and the proper procedures followed is discussed at length in *Fare* v. *Michael C.*, 442 U.S. 707 (1979). In *Fare* the lower court had extended the *Miranda* rule prohibiting reinterrogation to a situation where a juvenile had requested to speak to his probation officer. The Court reversed, reasoning that the role of an attorney for Fifth Amendment purposes is critically distinct from that of a probation officer:

> The rule in *Miranda* . . . was based on this Court's perception that the lawyer occupies *a critical position in our legal system* because of his unique ability

> to protect the Fifth Amendment rights of a client undergoing custodial interrogation. Because of this special ability of the lawyer to help the client preserve his Fifth Amendment rights once the client becomes enmeshed in the adversary process, the Court found that 'the right to have counsel present at the interrogation is *indispensable to the protection of the Fifth Amendment privilege* under the system' established by the Court. *[Miranda]* at 469; 86 S.Ct. at 1625. Moreover, the lawyer's presence helps guard against overreaching by the police and ensures that any statements actually obtained are accurately transcribed for presentation into evidence. *[Miranda]* at 470; 86 S.Ct. at 1625.

442 U.S. at 719 (emphasis added). In sum, "the assistance of counsel can mitigate the dangers of untrustworthiness . . . [and] the likelihood that the police will practice coercion is reduced . . ." *Miranda*, 384 U.S. at 470.

The integrity of the truth-finding process and assurance of accuracy of criminal trials depend upon the application of the principles enunciated in the Federal Constitution and the procedures designed by the Court to safeguard them. Those procedures were violated when Shea was reinterrogated after assertion of his right to counsel. Admission into evidence of the statements thereafter obtained constitutes grave constitutional error and violates *Miranda* and its progeny, including *Edwards*, which opinion had been handed down prior to the Louisiana Supreme Court's decision affirming Shea's conviction. Though the Court indicated in *Solem* that the relationship between *Edwards* and the truth-finding process is not close enough to warrant complete retroactivity, it is more than enough to warrant limited retrospective application to Shea's conviction.



**C. Reliance on the old standards is an inappropriate consideration with respect to the retrospective application of *Edwards* v. *Arizona*.**

In *Solem* v. *Stumes*, 104 S.Ct. at 1343, the Court stated that *Edwards* was "not the sort of 'clear break case that almost automatically is nonretroactive . . . nonetheless did establish a new rule.' " Petitioner respectfully submits that the decision in *Edwards* is subject to several interpretations, one of which is that the "new rule" did not create a new limitation on police conduct during interrogation. To the contrary, the "new rule" authorizes police conduct which could have been considered prohibited by a fair construction of *Miranda* and its *progeny*. The holding in *Edwards* reads as follows:

> . . . we now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, *unless* the accused himself initiates further communication, exchanges or conversations with the police. (emphasis added)

451 U.S. at 484-485. Initiation by the accused *excepts* statements thereafter made by him from the rule of exclusion set forth in *Miranda* and reiterated in its progeny.

Prior to *Edwards* v. *Arizona* the rule concerning renewed custodial interrogation after assertion of the right to counsel was simple and clear as noted by the Court on numerous occasions. In *Michigan* v. *Mosely*, 423 U.S. 96, 100, N.7 (1975), the Court stated:

> The present case does not involve the procedures to be followed if the person in custody asks to consult

with a lawyer, since Mosley made no such request at any time. Those procedures are detailed in the *Miranda* opinion as follows:

> 'If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent.'

In his concurring opinion in that case, Justice White pointed out that "[t]he Court showed [in *Miranda*] . . . that when it wanted to create a *per se* rule against further interrogation after assertion of a right, it knew how to do so. The Court . . . said 'if the individual states that he wants an attorney the interrogation must cease until an attorney is present.' *Miranda* v. *Arizona*, 384 U.S. at 474 (1966)." *Id.* at 109.

The Court's opinion in *Fare* v. *Michael C.*, 442 U.S. 707 (1979) begins by stating that *Miranda* "specified" that interrogation must cease after an accused expresses his intention to exercise his right to counsel. The *Miranda* safeguards are referred to repeatedly as "*per se*," and the rule established therein as "clear." *Id.* at 717, 719. Recognizing the primary role of the attorney as the protector of rights (as discussed earlier in brief), the Court stated:

> "For this reason, the Court fashioned in *Miranda* the rigid rule that an accused's request for an attorney is *per se* an invocation of his Fifth Amendment rights, requiring that all interrogation cease."

442 U.S. at 719.

The starting point of the Court's opinion in *Rhode Island* v. *Innis*, 446 U.S. at 293 goes even further than



that of *Fare*. Where *Fare* noted that the Court "specified" the standards concerning custodial interrogation, Justice Stewart in *Rhode Island* begins the majority opinion with the statement that "[i]n *Miranda* v. *Arizona* (citations omitted) the Court *held* . . ." (emphasis added). There was no doubt about the rule that interrogation must cease until an attorney is present; the concern in that case was what constituted interrogation, an issue further clarified in *Edwards*.

In *Solem* v. *Stumes* the Court concluded that because it could not be said that *Edwards* had been clearly foreshadowed, the reliance interest was compelling and complete retroactivity was inappropriate. Of critical importance to the Court's statement that "[w]e do not believe that the police can be faulted if they did not anticipate its *per se* approach," 104 S.Ct. at 1343, is the following passage from the majority opinion in *Fare* v. *Michael C.*, 442 U.S. at 718:

> Whatever the defects, if any, of this relatively rigid requirement that interrogation must cease upon the accused's request for an attorney, *Miranda's* holding has *the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation*, and of informing courts under what circumstances statements obtained during such interrogation are not admissible. (emphasis added)

Law enforcement officials were well aware, or most certainly should have been, of the restrictions upon custodial interrogation. Furthermore, the holding in *Edwards* v. *Arizona* loosened rather than tightened those restrictions by creating an exception to the former rigid rule. As Justice Stevens observed in his dissenting opinion in *Solem* v. *Stumes:*

> [t]he fact that some police departments may have failed to heed the plain language of the *Miranda*

opinion certainly is not justification for reaching the conclusion that the reconfirmation of what was said in *Miranda* should be regarded as a new constitutional rule." 104 S.Ct. at 1351.

**D. Limited retrospective application of *Edwards* v. *Arizona* would not have a significant impact on the administration of criminal justice.**

In rejecting total retroactivity of *Edwards* the Court in *Solem* v. *Stumes* noted the "disruptive effect" such would have on the administration of justice as one could "only guess at the number of cases where *Edwards* might make a difference . . ." 104 S.Ct. at 1345. Those factors do not apply in the case at bar because such a result would not occur where retroactivity is limited to only those cases that were pending on direct appeal, as Shea's was, in May 1981 when *Edwards* was decided. Clearly the number of cases would be greatly reduced. Furthermore, many state and federal courts when faced with the issue, both on direct appeal and habeas, had applied *Edwards* retroactively prior to the decision in *Solem*. Some of the decisions did so without discussion. Others either specifically held *Edwards* to be retroactive or found no reason to so hold because *Edwards* did not create a new rule.

In *People* v. *Paintman*, 412 Mich. 518, 315 N.W. 2d 418 (1982), the Michigan Supreme Court found that it was "unnecessary to analyze the question of retroactivity under traditional standards" because, rather than announcing a new rule, *Edwards* merely clarified and reconfirmed existing law. The Minnesota Supreme Court held that *Edwards* is to be applied retroactively for the same reason. *State* v. *Brown*. 317 N.W. 2d 714 (Minn. 1982).

The state courts of last resort in Alaska and Colorado applied *Edwards* to cases arising prior to the decision.



*Giacomazzi* v. *State*, 633 P.2d 218 (Alk. 1981); *People* v. *Cerezo*, 635 P.2d 197 (Col. 1981). The courts of appeal in Oregon, Texas and Arizona also applied *Edwards* to factual situations that arose prior to May 1981. *Oregon* v. *Tyler*, 643 P.2d 379 (Ore. App. 1982); *Hunt* v. *State*, 632 S.W.2d 640 (Tex. App. 1982); *State* v. *Platt*, 637 P.2d 1073 (Ariz. App. 1982).

In the following cases the federal courts of appeal have given *Edwards* retrospective application without discussion of the issue: *U.S.* v. *Hinckley*, 672 F.2d 115 (D.C. Cir. 1981); *U.S.* v. *Kiendra*, 663 F.2d 349 (1st Cir. 1981); *U.S.* v. *Gordon*, 655 F.2d 478 (2nd Cir. 1981); *Piankhy* v. *Cuyler*, 703 F.2d 728 (3rd Cir. 1983); *Silva* v. *Estelle*, 672 F.2d, 457 (5th Cir. 1982); *Jacks* v. *Duckworth*, 651 F.2d 480 (7th Cir. 1981); *U.S.* v. *Wellins*, 654 F.2d 550 (9th Cir. 1981); *U.S.* v. *Simko*, 662 F.2d 660 (10th Cir. 1981); and *U.S.* v. *Bosby*, 675 F.2d 1174 (11th Cir. 1982).

In light of the numerous decisions already applying, at the least, limited retrospective application of *Edwards*, for the Court to so hold in this case would affect the criminal justice system only minimally.

## CONCLUSION

The Court should hold that *Edwards* v. *Arizona* applies to Petitioner's conviction which was not yet final at the time *Edwards* was decided and reverse the judgment of the Louisiana Supreme Court.

Respectfully submitted,

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No. 82-5920

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

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KEVIN MICHAEL SHEA,

*Petitioner,*

v.

STATE OF LOUISIANA,

*Respondent.*

---

**On Writ Of Certiorari To The Supreme Court Of Louisiana**

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## BRIEF OF RESPONDENT

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

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No. 82-5920

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KEVIN MICHAEL SHEA,

*Petitioner,*

v.

STATE OF LOUISIANA,

*Respondent.*

---

**On Writ Of Certiorari To The Supreme Court Of Louisiana**

---

## BRIEF OF RESPONDENT

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### SUMMARY OF ARGUMENT

The question raised by Petitioner is whether the *per se* rule announced in *Edwards* v. *Arizona*, 451 U.S. 477 (1981), forbidding reinterrogation of a suspect by law enforcement authorities after the invocation of his right to counsel, should be extended to cases that were on direct appeal on the date *Edwards* was decided. Respondent submits that only prospective application of the *Edwards* rule is mandated by the Constitution insofar as the modern-day retroactivity analysis does not support retroactive application.

The retroactivity of a new constitutional directive is determined by three primary factors, i.e. the purpose to be served by the new rule, the extent of reliance by law enforcement officials on the former constitutional stand-

ards, and the effect on the administration of justice of retroactive application of the new principle. *Stovall* v. *Denno*, 388 U.S. 293, 297, 87 S.Ct. 1967, 1970, 18 L.Ed.2d 1199 (1967). This Court concluded in *Solem* v. *Stumes*, ___ U.S. ___, 104 S.Ct. 1338 (1984) that the aforementioned factors precluded retroactive application of the *Edwards* mandate to cases on collateral review at the time *Edwards* was decided.

Respondent submits that consideration of the status of Petitioner's case, while relevant, is not a *primary* factor for this Court to consider in determining the retroactivity of *Edwards' per se* rule. Whereas the posture of a case may have greater significance with decisions construing other constitutional dimensions, e.g. *United States* v. *Johnson*, 457 U.S. 537, 102 S.Ct. 2579, 73 L.Ed.2d 202 (1982) (Fourth Amendment), it is of lesser importance where the new constitutional dictate is prophylactic in nature.

The purpose of the *Edwards* rule cannot be served by even limited retroactive application. The rule prohibiting reinterrogation of a suspect who has previously invoked his right to counsel was not designed to enhance the accuracy of criminal trials. A defendant could challenge the voluntariness of his statement under the existing substantive tests for voluntariness prior to *Edwards*. Instead, the purpose of the *Edwards* rule is to prevent law enforcement authorities from engaging in overbearing police practices during custodial interrogations. Thus, *Edwards* created a prophylactic rule to guide the conduct of law enforcement authorities. This Court has frequently held that prophylactic rules are not given retroactive effect. *Michigan* v. *Payne*, 412 U.S. 47, 93 S.Ct. 1966, 36 L.Ed.2d 736 (1973); *Stovall* v. *Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967).



Furthermore, law enforcement authorities justifiably relied on the old standards which delineated the test governing the waiver of *Miranda* rights. Most jurisdictions applied the "knowing, voluntary, and intelligent" test of *Johnson* v. *Zerbst*, 304 U.S. 458, 464, 58 S.Ct 1019, 1023, 82 L.Ed.2d 1461 (1938) on a case-by-case basis. *Edwards* introduced a new, bright-line rule regarding the waiver of the right to counsel: the suspect had to initiate subsequent communication. Prior to *Edwards* law enforcement officers and lower courts justifiably believed that a suspect could waive his right to counsel even if the police initiated the conversation.

Lastly, the retroactive application of *Edwards* to cases on direct appeal at the time *Edwards* was decided would have a disruptive effect on the administration of justice. Respondent submits that a sufficient number of cases exist to warrant only prospective application of the *Edwards* rule. Retrial of convictions obtained many years ago would entail significant hardship upon law enforcement officials. Moreover, these convictions have already been obtained in conformity with previously-announced sound constitutional standards.

Respondent respectfully submits that modern-day retroactivity analysis warrants prospective application of the *Edwards* v. *Arizona* rule from the date of its decision and that our Constitution demands nothing more.

## ARGUMENT

### I. The Ruling Announced In *Edwards* v. *Arizona* Should Not Apply To Petitioner Shea's Conviction Although His Conviction Was Not Yet Final At The Time Edwards Was Decided.

On February 29, 1984, this Court held in *Solem* v. *Stumes*, ___ U.S. ___, 104 S.Ct. 1338 (1984) that the

bright-line rule announced in *Edwards* v. *Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), would not be applied retroactively to cases on collateral review. Petitioner Shea's conviction, which was pending direct appellate review at the time *Edwards* was decided, was not encompassed by the Court's decision in *Solem*. Indeed, the Court in *Solem* expressly reserved comment on whether the benefit of *Edwards* would be extended to cases having the same status as Petitioner. *Solem*, *supra*, at 1346.

As the majority noted in *Solem*, *Linkletter* v. *Walker*, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965), *Tehan* v. *Shott*, 382 U.S. 406, 86 S.Ct. 459, 15 L.Ed.2d 453 (1966), and *Johnson* v. *New Jersey*, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966), set forth the basic principles of retroactive application of new constitutional standards in criminal cases. The Court's analysis includes consideration of:

A) the purpose to be served by the new standards,

B) the extent of the reliance by law enforcement authorities on the old standards, and

C) the effect on the administration of justice of retroactive application of the new standards. *Stovall* v. *Denno*, 388 U.S. 293, 297, 87 S.Ct. 1967, 1970, 18 L.Ed.2d 1199 (1967).

Upon examining the holding of *Edwards* in light of these factors, a majority of the Court in *Solem* concluded that *Edwards* 1) was a prophylactic rule designed to guide police conduct and shed little light on truth-finding; 2) that law enforcement officers could not have reasonably been expected to foresee its new bright-line approach; and 3) that retroactive application would disrupt the administration of justice. *Solem*, *supra*, at 1345.



*Solem* reaffirms the analysis utilized in the modern-day retroactivity cases. The *status* of a case, i.e., whether it is on collateral or direct review, is not a primary factor to consider in determining the retroactivity of decisions construing the *Fifth Amendment* right against self incrimination. The posture of the case may take on added weight, however, when the new postulate construes yet another constitutional provision, e.g., *United States* v. *Johnson*, 457 U.S. 537, 102 S.Ct. 2579, 73 L.Ed.2d 202 (1982) (Fourth Amendment). The paramount concerns are, again, the purpose to be served by the new rule, the extent of the reliance by law enforcement officials on the old standards, and the effect on the administration of justice.

Respondent admits, however, that the posture of Petitioner Shea's case is relevant. To allege otherwise would be to ignore centuries of interpretation of constitutional law. Respondent respectfully submits that the consideration of the status of Petitioner's case is of lesser importance where the new constitutional dictate is prophylactic in nature. Consideration of the posture of Shea's case is more appropriately addressed upon examination of the effect on the administration of justice of retroactive application of the new standard, rather than as a separate and additional factor.

This conclusion is borne out by the recent decision of the majority in *Solem*. The majority's application of the retroactivity principles does not support Shea's assertion that the status of his case warrants an outcome that differs from the result in *Solem* (Pet. Br. pp. 8-10). Moreover, Justice O'Connor's chambers opinion in *Tate* v. *Rose*, ____ U.S. ____, 104 S.Ct. 2186 (1984), rendered on May 19, 1984, in which the reasoning behind *Solem* was briefly capsulized, fails to illustrate the importance, or

even the consideration of, the status of the case when determining the retroactivity of a new constitutional rule of law.

**A. The purpose of the *Edwards per se* approach would not be served by even limited retroactive application.**

The decisions of this Court establish that the purpose of the new constitutional rule is to be given paramount consideration. *Brown v. Louisiana*, 447 U.S. 323, 328, 100 S.Ct. 2214, 2219, 65 L.Ed.2d 159 (1980); *Desist v. United States*, 394 U.S. 244, 249, 89 S.Ct. 1030, 1033, 22 L.Ed.2d 248 (1969). The interests of justice and the exigencies of the situation may preclude the retroactive application of a new constitutional decision. *Linkletter v. Walker*, *supra*, 381 U.S. at 628; *Johnson v. New Jersey*, *supra*, 384 U.S. at 726 f; *Solem*, *supra*, at 1341.

"Complete retroactive effect is most appropriate where a new constitutional principle is designed to enhance the accuracy of criminal trials." *Id* 104 S.Ct. at 1342, quoting from *Williams v. United States*, 401 U.S. 646, 653, & n. 6, 91 S.Ct. 1148, 1152 & n. 6, 28 L.Ed. 388 (1971). The majority in *Solem* noted that " the question whether a constitutional rule of criminal procedure does or does not enhance the reliability of the fact-finding process at trial is necessarily a matter of degree. "*Johnson v. New Jersey*, *supra*, 384 U.S. at 728 f.

Respondent submits that *Edwards* has little to do with guaranteeing the accuracy of the truth-finding function of criminal trials. The purpose of *Edwards* does not implicate the fair determination of guilt or innocence. Rather, its role is protective—it prevents the police from engaging in overbearing police practices during custodial interrogations. Prior to *Edwards* a defendant could challenge the voluntariness of his statement by a motion to



suppress under the existing substantive tests for voluntariness, thus protecting the accuracy of truth-finding at trial. See *Haynes v. State of Washington*, 373 U.S. 503, 83 S.Ct. 1336, 10 L.Ed.2d 513 (1963); *Spano v. New York*, 360 U.S. 315, 79 S.Ct. 1202, 3 L.Ed.2d 1265 (1959). As the Court noted in *Solem*, "the fact that a suspect has requested a lawyer does not mean that statements he makes in response to subsequent police questioning are likely to be inaccurate." *Solem*, *supra*, at 1342.

This is particularly evident in Petitioner Shea's case. His confession is more than amply corroborated by the evidence. The coercion which caused so much concern in *Miranda* and *Escobedo v. Illinois*, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964), and the "badgering" present in *Edwards* simply are not present in Petitioner's case. Thus, the reliability of his statement cannot seriously be questioned.

Most important, however, this Court noted in *Oregon v. Bradshaw*, ___ U.S. ___, 103 S.Ct. 2830, 2834, 77 L.Ed.2d 405 (1983), that the rule of *Edwards* " . . . was in effect a prophylactic rule, designed to protect an accused in police custody from being badgered by police officers in the manner in which the defendant in *Edwards* was." *Solem* verified that rather than creating a new constitutional right, the *Edwards* rule was "designed to implement pre-existing rights." *Solem*, *supra*, at 1343. *Edwards* excludes confessions, even if truthful, obtained beyond constitutional dictates. It is obvious that rather than concerning itself with the reliability of the jury's verdict, *Edwards* seeks to proscribe police conduct.

This Court has frequently held that prophylactic rules are not given retroactive effect. In *Michigan* v. *Payne*, 412 U.S. 47, 93 S.Ct. 1966, 36 L.Ed.2d 737 (1973) the

Court held that the prophylactic rule announced in *North Carolina* v. *Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), which guards against the possibility of vindictiveness in cases where a judge imposes a more severe sentence upon a defendant after a new trial, would not be applied retroactively. Nor was the prophylactic requirement that counsel be present at lineups given retroactive application. *Stovall* v. *Denno*, *supra*. By their very definition prophylactic rules are designed to prevent particular forms of conduct. Obviously, the purpose of a prophylactic rule cannot be promoted by its application to conduct which occurred prior to the creation of the rule.

Shea's statement was made on July 3, 1979, one year and ten months prior to the *Edwards* decision on May 18, 1981. Respondent is hard-pressed to imagine how the retroactive application of *Edwards* will deter the police "misconduct" that was in accord with prior sound constitutional principles before May 18, 1981.

The remaining factors—the extent of reliance and burden on the administration of justice—are to be relied upon "only when the purpose of the rule in question does not clearly favor either retroactivity or prospectivity." *Desist* v. *United States*, *supra*, 394 U.S. at 251. Respondent submits that the purpose of the rule clearly favors prospectivity. In addition, the State of Louisiana submits that the remaining factors also support the nonretroactivity of *Edwards*.

**B. The extent of reliance by law enforcement authorities on the old standards necessitates prospective application.**

The majority of the Court in *Solem* left no doubt that *Edwards* established a new rule regulating police conduct. The holding of *Edwards* makes this clear:



> . . . and we now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversations with the police. *Edwards*, *supra*, at 484 f.

Previous Supreme Court jurisprudence has refused to adopt *per se* rules governing the waiver of *Miranda* rights. *Michigan* v. *Mosley*, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975); *North Carolina* v. *Butler*, 441 U.S. 369, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979); *Brown* v. *Illinois*, 422 U.S. 590, 603-604, 95 S.Ct. 2254, 2261-2262, 45 L.Ed.2d 416 (1975). Indeed, even *Miranda* considered that a waiver of one of its warnings would be determined on a case-by-case basis, in each instance ascertaining whether the waiver had been knowing, voluntary, and intelligent, 384 U.S., at 475, 86 S.Ct., at 1628, quoting *Johnson* v. *Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed.2d 1461 (1938).

A great number of lower courts applied the foregoing rationale of *Miranda* and *Johnson* v. *Zerbst*, *supra*, while endeavoring to determine whether the statements given by the suspect were the product of coercion or a knowing and voluntary waiver. The Court in *Solem* indicated that numerous lower federal and state courts opined that a suspect could voluntarily waive his right to counsel after its invocation *even if the police initiated the conversation*. *Solem*, 104 S.Ct. at 1344, n. 8 at p. 1344-1345. See also the original Louisiana Supreme Court Opinion (J.A. 12) and

the Louisiana Supreme Court Opinion on Rehearing (J.A. 26). Admittedly, a few jurisdictions reached the holding of *Edwards* prior to its announcement by this Court. E.g., *United States* v. *Womack*, 54 F.2d 1047, 1050 f. (CA9 1976); *United States* v. *Priest*, 409 F.2d 491, 493 (CA5 1969). However, most law enforcement officers and trial courts did not have benefit of the *Edwards* standard prior to May 18, 1981. They did not have notice that statements taken in violation of that standard may not be used against the accused. Considering this confused state of affairs it can hardly be contended that the police should have anticipated *Edwards' per se* approach.

The bright-line rule in *Edwards* was a necessary one. The state of the law regarding the waiver of the right to counsel after its invocation by a suspect was unclear. *Edwards* sought to shed light on the darkness by declaring that a waiver of the right to counsel could be accomplished in only one manner: the suspect had to initiate subsequent communication. The initiation aspect of interrogation suddenly reached constitutional dimensions with the advent of *Edwards* whereas earlier it was only one of several factors to consider in evaluating a waiver of the *Miranda* rights. A pre-*Edwards* inquiry by a law enforcement officer as to whether a suspect had changed his mind and desired to speak without an attorney would not have jeopardized the suspect's constitutional rights. The same inquiry post-*Edwards* likely will result in the suppression of the statement.

The *Edwards* approach to police activity had not been clearly foreshadowed. *Solem*, *supra*, at 1345. Law enforcement authorities fairly relied on their expectation that a suspect could knowingly and voluntarily waive his right to counsel after its invocation. Under these circumstances, the State of Louisiana submits that reliance on



prior law by both the police and lower courts was justifiable and that these considerations militate against limited retroactive application of the *Edwards* principle.

**C. The retroactive application of *Edwards* v. *Arizona* would have a disruptive effect on the administration of justice.**

The final criterion is whether retroactive application of the *Edwards per se* rule to cases on direct appeal at the time *Edwards* was decided would have a disruptive effect on the administration of justice. Respondent submits that such would indeed occur.

The administration of our criminal laws would be hampered by the retrial of numerous prisoners already found guilty by trustworthy evidence in conformity with previously announced constitutional standards. *Johnson* v. *New Jersey*, *supra*, 384 U.S. at 731. Although empirical statistics are unavailable, Respondent submits that a sufficient number of cases exist to warrant the nonretroactive application of the *Edwards* rule. See *Tate* v. *Rose*, *supra*, and *State of Connecticut* v. *Lester Smith* (Connecticut Supreme Court Docket No. 12,4506). These cases may be only the tip of the iceberg, albeit a smaller iceberg than the one presented in *Solem*. This Court has noted in previous decisions that investigation and retrial of cases conducted many years ago involves not only expense and effort but the risk of unavailability of witnesses, poor memories, and lost evidence. *Solem*, *supra*, at 1338; *Williams* v. *United States*, *supra*, 401 U.S. 646, 654; *Jenkins* v. *Delaware*, 395 U.S. 213, 220, 89 S.Ct. 1677, 1681, 23 L.Ed.2d 253 (1969).

The above considerations are highly relevant to the State's case against Petitioner. The investigation of the two armed robberies was conducted more than five years

ago. It would impose a severe hardship upon the State if it were required to reconstruct its case against Petitioner. Difficulties in relocating witnesses to the armed robberies are likely to be encountered. To expect those witnesses available for trial to recollect events that occurred so long ago may erect insurmountable barriers for the State.

Of even greater importance is the fact that there is no doubt whatsoever as to the reliability of the jury's verdict which was rendered more than four years ago. The evidence in this case indicates that Mr. Tuminello was robbed of cash and checks by two men after one had fired a pistol shot into the floor. The victim immediately called the police and provided detailed descriptions of his assailants. Shreveport Police officers, having been notified of the robbers' physical descriptions via radio, spotted Petitioner and his accomplice only three blocks away. Pursuant to their arrest, a search of the suspects unveiled a wad of money and checks payable to Tuminello's business, in addition to a revolver with one spent cartridge. Petitioner and his confederate were identified that same day by Mr. Tuminello and Ms. Dick in a six-man lineup.

The State of Louisiana respectfully submits that because the deterrent purpose of *Edwards* overwhelmingly supports nonretroactivity, this Honorable Court should conclude likewise even if relatively few convictions would be set aside by its retroactive application.

## CONCLUSION

Simple logic dictates prospective application of the *Edwards* rule from the date of its inception, May 18, 1981. The policies underlying *Edwards' per se* rule cannot be furthered by even limited retroactive application. Police conduct that was in accord with prior sound constitutional principles should remain undisturbed. More than adequate safeguards existed at the time of Petitioner's trial to protect him from the introduction of coerced and involuntary statements. Because the prophylactic purpose of *Edwards* overwhelmingly supports nonretroactivity, the State of Louisiana submits that only prospective application of *Edwards* is mandated by the Constitution.



WHEREFORE, the State of Louisiana respectfully requests that this Court uphold the judgment of the Louisiana Supreme Court and find that Petitioner is not entitled to any relief under *Edwards* v. *Arizona*.

Respectfully submitted,

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**CERTIFICATE**

I HEREBY CERTIFY that a copy of the foregoing brief has been mailed to Ms. Frances Baker Jack, counsel for petitioner, Suite 101, Energy Square, 212 Texas Street, Shreveport, Louisiana, 71101, postage prepaid, this 27 day of July, 1984.

John A. Broadwell
JOHN A. BROADWELL

Office - Supreme Court, U.S.
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No. 82-5920

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

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KEVIN MICHAEL SHEA,
*Petitioner,*

v.

STATE OF LOUISIANA,
*Respondent.*

---

**On Writ of Certiorari to the Supreme Court of Louisiana**

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## REPLY BRIEF OF PETITIONER

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## REPLY BRIEF OF PETITIONER

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### I. STATUS OF A CASE IS A PRIMARY FACTOR IN QUESTIONS OF RETROACTIVITY

Because the State takes the position in its reply brief that status of a case is not a primary factor in determining the retroactivity of an intervening decision, a full discussion on the issue of status is warranted. The *Stovall* factors discussed in Petitioner's original brief on the merits are one approach to the issue of retroactivity. *Stovall* v. *Denno,* 388 U.S. 293 (1967). When applied to this case, those factors warrant retroactive application of *Edwards*

v. *Arizona. Stovall* is not the only or most appropriate approach in this case, however. In outlining the criteria to be used in *Solem,* the Court referred to *Stovall, Linkletter* v. *Walker,* 381 U.S. 618 (1965), *Tehan* v. *Shott,* 382 U.S. 406 (1966), and *Johnson* v. *New Jersey,* 384 U.S. 719 (1966) as authority. Each of those cases arose on collateral review. On the other hand, *U.S.* v. *Johnson,* 457 U.S. 537 (1982), came before the Court on direct review, as does Petitioner. In *Johnson* Justice Blackmun adopted the Harlan approach to retroactivity. That approach consists of applying new rules of constitutional law to cases still subject to direct review by the Court at the time the new decision was rendered. In the absence of a retroactivity question clearly controlled by prior precedents, the Harlan approach resolves the issue in a "principled and equitable manner." 457 U.S. 548. It represents a departure from the "ambulatory" nature of decision-making that has plagued the area of retroactivity and generated a "welter of 'incompatible rules and inconsistent principles.'" *Johnson,* 457 U.S. at 546, quoting from *Desist* v. *U.S.,* 394 U.S. 244, 258 (J. Harlan dissenting). That approach is appropriate in this case.

In *Johnson* the Court addressed the issue of the retroactivity of the decision of *Payton* v. *New York,* 445 U.S. 573 (1980), and held that *Payton* applied to all convictions not yet final at the time it was rendered. The question of retroactivity was not answered by precedent, therefore, the Harlan approach was used.

The question of whether *Edwards* should be given retrospective application is, likewise, not answersd by precedent. Three categories of cases set such precedents and, as evidenced by the Court's decision in



*Solem* v. *Stumes,* — U.S. —; 104 S.Ct. 1338 (1984), *Edwards* fits into none of these. The first category is those cases which apply established rules of law to new factual situations. In *Solem* the Court held that *Edwards* established a new rule (though Petitioner contends it created a new exception to an established rule), thus removing it from that category. The second class of decisions include those which indicate a "clear break with the past" and are invariable nonretroactive. Though *Solem* held that *Edwards* established a new rule, it also held that "it was not the sort of 'clear break' case that is almost automatically nonretroactive." *Solem,* 104 S.Ct. at 1343. Finally, *Edwards* did not involve the trial court's lack of authority to convict or punish the defendant, the third category.

The Harlan approach thus becomes appropriate, as it was in *Johnson,* for answering the question posed by Petitioner. The concerns originally expressed in Justice Harlan's dissent in *Desist, supra,* would be satisfied. The original understanding of retroactivity first stated in 1801 in *U.S.* v. *Schooner Peggy,* 1 Cranch 103; 2 L.Ed. 49, would be carried on and another step would be taken toward rejecting the "ad hoc approach that has so far characterized [the Court's] decisions in the retroactivity field . . ." *Jenkins* v. *Delaware,* 395 U.S. 213, 224 (1969) (J. Harlan dissenting), quoting in *Johnson,* 457 U.S. at 562.

Application of *Edwards* to cases then pending on direct review would be consistent with the judicial responsibility of doing justice to each litigant on the merits of his own case, another concern voiced in *Desist* and *Johnson.* In both *Edwards* and *Shea,* confessions obtained after the right of counsel had been

invoked were admitted into evidence over defendants' objections. The lower court in *Edwards* was reversed for conduct identical to that of the trial court in the case at bar. To now affirm the Louisiana Supreme Court's refusal to apply *Edwards* would be a violation of the governing constitutional principles reaffirmed by Justice Blackmun in *Johnson:*

> If a "new" constitutional doctrine is truly right, we should not reverse lower courts which have accepted it; nor should we affirm those which have rejected the very argument we have embraced.

457 U.S. at 555, quoting *Desist,* 394 U.S. at 259.

The unfairness of treating similarly situated defendants differently would be obliterated by application of the Harlan approach. Like Petitioner, Edwards was interrogated prior to the rule established in *Edwards v. Arizona.* He received the benefits of the rule; Petitioner should be afforded the same.

The principles applied in *Johnson* were mentioned in a footnote to the Court's opinion in *Solem.* Referring to the "slightly different approach" of *Johnson,* the Court found it to be inapplicable because, unlike *Johnson, Solem* arose on collateral review. 104 U.S. at 1341, N.3. Petitioner comes before this Court in the same posture as *Johnson,* on direct review. It is apparent that the principles of *Johnson* should apply herein.



## II. LIMITED RETROSPECTIVE APPLICATION OF EDWARDS V. ARIZONA WOULD NOT HAVE A SIGNIFICANT IMPACT ON THE ADMINISTRATION OF JUSTICE

In Petitioner's original brief on the merits, it was argued that the criminal justice system would feel only a minimal effect from a decision by the Court holding *Edwards* v. *Arizona* retroactive to cases pending on direct review at the time it was rendered. Reference was made to several state and federal decisions which had either specifically held that *Edwards* was retroactive or applied *Edwards* to factual situations arising prior to the decision without discussion of the retroactivity issue. As a supplement to the original brief, the following cases exhibit other jurisdictions which have likewise applied *Edwards* retroactively. In *State* v. *Monroe,* 645 P.2d 363 (Idaho Sup. Ct. 1982) and *State* v. *Blakney,* 641 P.2d 1045 (Mont. Sup. Ct. 1982), the cases came before the courts on remand from the Court. Both cases had been sent back, after writs of certiorari had been granted, for reconsideration in light of *Edwards. Edwards* was applied in both without discussion of retroactivity. Courts in Hawaii, Kansas, Nevada, Delaware, Maryland, Wyoming, Alabama, and Mississippi have also applied *Edwards* to factual situations arising prior to May, 1981, without discussion on the issue of retroactivity. *State* v. *Brezee,* 657 P.2d 1004 (Hawaii 1983); *State* v. *Carty,* 644 P.2d 407 (Kansas 1982); *Ludwig* v. *State,* 634 P.2d 664 (Nev. 1981); *Boyer* v. *State,* 436 A.2d 1118 (Del. 1981); *Bryant* v. *State,* 431 A.2d 714 (Md. App. 1981); *Daniel* v. *State,* 644 P.2d 172 (Wyo. 1982); *Warrick* v. *State,* 409 So.2d 984 (Ala. App. 1982); *Davis* v. *State,* 406 So.2d 795 (Miss. 1981).

Thus far it appears that only two jurisdictions have specifically rejected retroactivity of *Edwards*—Louisiana and New Jersey. *State* v. *Shea,* 421 So.2d 200 (La. 1982) and *State* v. *McCloskey,* 446 A.2d 1204 (N.J. 1982). Because of the number of jurisdictions that already applied *Edwards* and the fewer number of cases that were on direct appeal as opposed to collaterial review in May, 1981, any impact on the administration of criminal justice resulting from a decision adopting Petitioner's position will be almost virtually non-existent.

Respectfully submitted,

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